

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

31-4
397

In The
United States Court of Appeals

For the District of Columbia

No. 24464

WADE V. CARTER, JR., FRANK R. COSTANZO, ARTHUR
M. HILAND, ROBERT KNAPP, YANE LEVES, LEONARD
B. WILSON, and all other similarly situated,

Plaintiffs - Appellants,

- against -

PANAMA CANAL COMPANY,

Defendant - Appellee.

*On Appeal from the United States District Court for the
District of Columbia*

APPENDIX

A. FRED FREEDMAN
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for the District of Columbia Circuit

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November 18, 1968	Answer of deft. to complaint; c/m 11/12/68 Appearance of David G. Bress, Edwin L. Weisl, Jr., and Robert R. Donlan Filed
November 18, 1968	Calendared. (AC/N) (N)
October 1, 1969	Certificate of Readiness by plft.; c/m 9/30/69 Filed
February 18, 1970	(Motion to amend pretrial order) Granted. (fiat) (N) Parker, J.
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May 20, 1970	Memorandum and Order dismissing complaint (N) Corcoran, J.
June 12, 1970	Notice of appeal by Plft. from order of May 20, 1970. Copy mailed to Robert Donlan
July 16, 1970	Record on Appeal delivered to USCA; Filed
July 16, 1970	Receipt from USCA for original record; Filed

MEMORANDUM AND ORDER
(FILED 5/20/70)UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WADE V. CARTER, et al., :
Plaintiffs :
v. : Civil Action
PANAMA CANAL COMPANY, : No. 1890-68
Defendant :
:

FILED

MAY 20 1970

ROBERT M. STEARNS, Clerk

I.

The plaintiffs are towing locomotive operators employed by the defendant Panama Canal Company in the Canal Zone. They seek overtime pay of at least 15 minutes per day of allegedly compensable work computed in accordance with 5 U.S.C. § 5544 for all time spent performing the activity in question since July 29, 1965.

The defendant Panama Canal Company is a federally chartered corporation of the United States and is subject to suit in the United States District Court for the District of Columbia pursuant to 2 Canal Zone Code §§ 61(c) and 65(a)(3).

II.

To transit the Panama Canal a vessel must pass through three lockage areas, i.e., Pedro Miguel and Miraflores on the Pacific side, and Gatun on the Atlantic side. Each plaintiff works at one of the three areas on an eight hour shift.

The plaintiffs operate electrically-driven towing locomotives to pull ships through the locks and to control

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the lateral movement of the ships within the lock chambers.

The locomotives move on each side of a lock chamber and travel the full length of the chamber wall.

At the end of any given work period the operator leaves his locomotive where it then is. That requires the succeeding operator to proceed to that point to assume his duties since historically the duty station of an operator has always been the locomotive to which he is assigned. However, prior to reporting to the lock area the operator knows neither the identity nor the location of the locomotive to which he is assigned for that particular work period. To learn the location and the identity of the locomotive to which he is assigned the operator must check at a lockage assignment board located within the lock area, put a mark by his name on the board, and walk to the designated locomotive.

At Gatun the assignment board is about 75 feet from the main gate; at Pedro Miguel the assignment board is within 25 feet of the main gate; and at Miraflores the board is located in the control house some 500 feet from the main gate.

The time consumed by an operator in walking from the lockage assignment board to his assigned locomotive varies from 2 minutes to 15 minutes per day depending upon the location of his assigned locomotive. The average time is 8 minutes.

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There is no requirement that an operator report to the assignment board. The only requirement is that he report to his duty station (his locomotive) by the time his shift begins. However, since the assigned locomotive may be located the maximum distance from the assignment board, the operator of necessity must check the board at least 15 minutes before the start of his eight hour shift to arrive at his locomotive on time.

During the period an operator is on defendant's premises prior to reaching his duty station he is subject to defendant's rules and regulations governing employees and may be disciplined for violation of those rules.

Prior to January 1, 1968, locomotive operators were required to check in and out with a timekeeper at the main gate of the lock area merely for the purpose of determining their presence in the lock area, not for the purpose of time-keeping.

For a long period prior to the commencement of this case (and at least prior to July 29, 1965) the locomotive operators and their representatives, including National

1/ An operator is also subject to a reporting procedure known as a call-in on an "as soon as possible" basis. Under this procedure an operator may be called in when there is a breakdown or the regularly scheduled locomotive operator is either ill or absent. On those occasions the operator receives compensation from the time he enters the gate at the lock area and the Company considers the time spent between entering the gate and reaching the locomotive as compensable work time. However, the emergency call-in for a locomotive operator creates an entirely different work situation than the normal scheduled work day. An emergency operator is in a stand-by situation without a particular duty station to report to immediately. Since he does not have an assigned duty station, and since he is present primarily for the benefit of the Company, a different standard must be used to fix his compensation and he is paid from the time he enters the main gate.

contra p. 134a

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Maritime Union of America, AFL-CIO, have requested the Canal Company to pay overtime for the time spent between checking the assignment board and reaching the locomotives as well as the additional time spent, prior to January 1, 1968, in checking in with the timekeeper and walking to the assignment board. The Company has rejected all formal and informal claims for this overtime compensation.

The question before the Court is whether the activity of the plaintiffs in checking the assignment board and walking to their duty stations constitutes compensable overtime work. For the reasons listed below the Court concludes that it does not.

III.

^{2/} The plaintiffs rely on 5 U.S.C. § 5544, the Federal Employees Pay Act, and the cases interpreting its application. ^{3/}

2/ In reference to overtime pay the statute reads:
"(a) An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week . . .

* * * *

"Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively."

3/ The Supreme Court in U.S. v. Townsley, 323 U.S. 557, 65 S.Ct. 413, 89 L.Ed. 454 (1945) and Hearne v. U.S., 331 U.S. 858, 67 S.Ct. 1750, 91 L.Ed. 1865 (1946) held that the predecessor to § 5544 (5 U.S.C. § 673c) was applicable to Panama Canal Company employees.

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However, the Federal Employees Pay Act simply grants employees the right under certain conditions to compensation for overtime work. It does not fully set out the standards as to what constitutes compensable overtime. To determine the standards and the types of activity that fall within the standards (and are thereby compensable as overtime) the Court must look to the Fair Labor Standards Act, 29 U.S.C. § 217 et seq., as amended.

The so-called Morse Amendment to that Act, 29 U.S.C. § 218(b) specifically made the Act's wage requirements applicable to all wage board employees of the Panama Canal Company. The Amendment provides that:

"(b) Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law -

- (1) any Federal employee in the Canal Zone engaged in employment of the kind described in section 5102(c)(7) of Title 5, or
- (2) any employee in a non-appropriated fund instrumentality under the jurisdiction of the Armed Forces, shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly-rate not less than the overtime rate provided for in section 207(a)(1) of this title."

The Portal to Portal Pay Act, 29 U.S.C. §§ 251-262, also amending the Fair Labor Standards Act, dealt specifically with the right to overtime compensation and it is to this act that the Court looks for guidance. The Portal to Portal Pay Act reads in pertinent part:

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"(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 -

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either --

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer." 29 U.S.C. § 254.

The plaintiffs rely heavily upon Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515

(1946) in which the Supreme Court addressed itself to the

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problem of what constitutes compensable activity. That case held that "the time necessarily spent by the employees in walking to work on the employer's premises, following the punching of time clocks, was working time within the scope of the [Fair Labor Standards Act]." Id. at 691.

In the Mt. Clemens case the employees spent 2 to 12 minutes walking on the premises. This time was under the complete control of the employer since it depended solely upon the physical arrangements of his plant. Such walking was for the benefit of the employer to enable him to achieve his productive aims, and it was in no way related to the convenience and necessity of the employee. The Court distinguished this walking time from the time spent in traveling from the employee's home to work and concluded that:

"[T]he time spent in walking to work on the employer's premises, after time clocks were punched, involved 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.' Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 598, Jewell Ridge Corp. v. Local, 325 U.S. 161, 164-166. Work of that character must be included in the statutory work week and compensated accordingly . . ." Id. at 691-692.

The Court also held that time necessarily spent by employees in preliminary activities after arriving at their places of work must be included within the work week and compensated accordingly. Id. at 692-693.

However, in both of the situations noted above the Court said it would be appropriate to apply a de minimus rule "where the minimum walking time is such as to be negligible" or when the preliminary activities involved "insubstantial and insignificant periods of time." Id. at 692-693.

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This decision standing alone is persuasive. However, one year after the Supreme Court spoke, the Portal to Portal Pay Act became law and it is quite evident from the text of ^{4/} the statute as well as from its legislative history that Congress intended to blunt the effect of the Mt. Clemens decision.

The Reports of the Senate Judiciary Committee clearly indicate that Congress considered reporting to a station for daily assignment or walking to a work area on the employer's premises not compensable within the meaning of the Act.

"[W]alking to his lathe, work bench, reporting station for his assignment for the day, or to other particular work location, is not to be considered an activity which is compensable under the Fair Labor Standards Act unless compensable by contract." S.REP. No. 37, 80th Cong., 1st Sess., 45 (1947).

To the same effect is Senate Report No. 48, 80th Cong. 1st Sess., 47 (1947), where it is stated:

"The rule laid down is that activities which take place either prior to the time at the beginning of his workday, when such employee commences, or subsequent to the time at the end of his workday, when such employee terminates his principal activity or activities, are activities (called portal-to-portal activities) which are not compensable except by contract or by a practice or custom not inconsistent therewith. The following activities outside the workday are among those not to be considered compensable under the Fair Labor Standards Act unless made so by contract or by a practice or custom not inconsistent therewith:

- (1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other

^{4/} Supra, page 6.

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place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out. Examples of this are (a) walking or riding from the plant gate to the employee's lathe, work-bench, or other actual place of performance of his principal activity or activities; (b) riding on busses from a town to an outlying mine; (c) riding on busses or trains from an assembly point to a particular site at which a logging operation is being conducted.

(2) Checking in or out and waiting in line to do so, changing clothes, washing up or showering, waiting in line to receive pay checks, and the performance of other activities occurring prior and subsequent to the workday, such as the preliminary activities which were involved in the Mt. Clemens case (U.S. No. 342, June 10, 1946).

The foregoing list of noncompensable activities is not intended to be exhaustive but merely to indicate some types of activities outside the employee's workday which are not to be compensable under the Fair Labor Standards Act"

In the Senate debate over the enactment of this statute, Senator Cooper, the bill's principal sponsor, said:

". . . [W]e have believed that . . . in the Mt. Clemens case the Court went too far and that under the decision . . . activities were held to be compensable when logically and equitably there should be no compensation activities The Committee decided, first, that we should make noncompensable, walking, riding, or traveling to and from the actual place of performance of the principal activities which such employee is employed to perform. Then, clearly and definitely, as to the future, an employee cannot receive compensation for any walking, riding, or traveling time to the actual place of performance where he begins his actual activities." (Emphasis supplied)
93 CONG. REC. 2296-2297 (1947).

It has been held that only if the activities in question are an "integral part of and indispensable to" the employee's principal activity are they compensable under the portal to

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portant provisions of the Fair Labor Standards Act. Steiner v. Mitchell, 350 U.S. 247, 255, 76 S.Ct. 330, 335, 100 L.Ed. 267 (1956).

Whether the activities were such an integral and indispensable part of the employee's principal activity as to be compensable is a question of fact. Dunning v. Q. O. Ordinance Corp., 233 F.2d 902, 903 (8th Cir. 1956).

The Court concludes that passing an assignment board and walking 2 to 15 minutes to a locomotive is not an "integral part of and indispensable to" the principal activity of operating the locomotive.

This activity is as much for the benefit of the employee as it is for the employer. Without passing an assignment board the operators would run the risk of not being on time at their locomotives. This is clearly distinguishable from the situation where an operator is called for emergency duty and receives compensation from the time he enters the gate. In this latter situation the benefit is all to the employer. Since it is not known immediately where the operator will work, he is usually on a stand-by basis to be used when and where the company needs him and is entitled under those ^{5/} conditions to be compensated.

The other cases relied on by the plaintiffs, in addition to Mt. Clemens, are distinguishable on their facts from the case at bar. In Abbot v. U.S., 151 F.Supp. 929 (Ct. of

5/ Supra, note 1.

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Claims, 1957) the vessel pilots in the Canal Zone were not compensated for the time spent in returning to their starting point after piloting a ship through the Canal if such time was in excess of their normal shift. The Court held that since this travel time was paid for by the company when it was not overtime, it could not be considered noncompensable just because it was overtime. That situation is clearly different from the issue facing the Court here.

In Anderson v. Panama Canal Company, 194 F.Supp. 765 (D.C.Z. 1961), rev'd on other grounds, 312 F.2d 98 (5th Cir.) cert. denied, 375 U.S. 832 (1963), dredge employees of the Company were not compensated for the time spent traveling in Canal vessels from the dock to the dredges. In holding this time compensable the Court noted that the dredge employees were often required to perform work for the Company while traveling to the dredge. This also differs from the case facing the Court as the Court has concluded that checking a name on an assignment board is not compensable activity.

The plaintiffs rely on Frank, et al. v. Wilson & Co., 172 F.2d 712 (7th Cir.) cert. denied, 337 U.S. 918 (1949) in arguing the inapplicability of the Portal to Portal Act to this situation. In Frank the Court found that a labor contract negotiated between the union and the company provided for overtime compensation for hours worked in excess of 40 hours a week. This contract as provided by § 254(b) took the case out from under the provisions of the Portal to

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Portal Act. In the case before the Court, however, there is not a negotiated contract but a statute giving federal workers a right to overtime compensation. A statute is clearly not a contract. If Congress had intended such a statute to also be an exception to the Act they obviously would have included it. And no mention of such an exception is found in the legislative history.

Aside from the appropriateness of the Portal to Portal Act in this situation, the activity here in question would fall under the de minimus rule. As noted above, the Supreme Court in Anderson v. Mt. Clemens Pottery Co., supra, 328 U.S. at 693, 66 S.Ct. at 1195, 90 L.Ed. 1515, pointed to the applicability of the de minimus rule where the preliminary activity involved "insubstantial and insignificant" periods of time. The Court looked to the realities of the industrial world and said "[I]t is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." Id. at 692. This section of the opinion was not considered when Congress enacted the Portal to Portal Act and remains the rule today.

Cases subsequent to Mt. Clemens have held the following amounts of time consumed in preliminary activities or walking to be de minimus: Frank, et al. v. Wilson & Co., 172 F.2d 712 (7th Cir.) cert. denied, 337 U.S. 918 (1949) (5 minutes); McIntyre v. Joseph E. Seagram & Sons, Inc., 72 F.Supp. 366 (W.D. Ky. 1947) (10-20 minutes); McComb v. C.A. Swanson & Sons, 77 F.Supp. 716 (D. Neb. 1948) (10-11 minutes);

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Lasater v. Hercules Powder Co., 73 F.Supp. 264 (E.D. Tenn. 1947) (possibly 10 minutes). Thus, the Court feels that the time required to look for and place a check mark by a name on the assignment board and walk to a duty station (2 to 15 minutes) is negligible and not compensable.

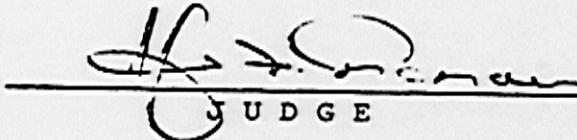
IV.

The Court concludes that the activity in question whether it falls under the Portal to Portal Act or under the de minimis rule is not compensable.

Having reached this decision the Court finds it unnecessary to discuss defendant's claims of laches and estoppel.

It is, accordingly, this 20^{7/7} day of May, 1970
ORDERED that the complaint be dismissed.

This memorandum constitutes the Court's findings of fact and conclusions of law.



JUDGE

Memorandum and Order

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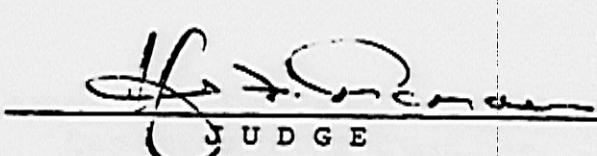
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JUDGE

DEPOSITION OF DALLAS BENTON THORNTON DATED 10/29/69
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WADE V. CARTER, et al.,

Plaintiffs,

NO. CA 1890/68

v.

DEPOSITION

THE PANAMA CANAL COMPANY,

OP

Defendant.

DALLAS BENTON THORNTON

APPEARANCES:

Abraham E. Freedman
Stanley B. Gruber, of Counsel
For the Plaintiffs

Robert R. Donlan, Trial Attorney, US
Department of Justice
For the Defendant

Robert J. Park
Attorney-Representative
Panama Canal Company

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<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Dallas Benton Thornton	1-11	12-20		

October 29, 1969 - 2:05 p.m.

Administration Building
Balboa Heights, Canal Zone

It is stipulated by and between counsel for the respective parties hereto that all objections except as to the form of the questions and/or responsiveness of the answers are reserved to the trial of the case.

DALLAS BENTON THORNTON, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Gruber:

- Q. Will you state your name and address for the record, sir?
- A. Dallas Benton Thornton. I live at 5426, Apartment A, Diablo, Canal Zone.
- Q. Are you employed by the Panama Canal Company, Mr. Thornton?
- A. Yes, I am.
- Q. Do you have a so-called IP number?
- A. Yes, I do.
- Q. What is that?
- A. 71617.
- Q. What is the nature of your employment with the Panama Canal Company?
- A. I'm a Towing Locomotive Operator.
- Q. How long have you held that position?

- A. Ten years last July.
- Q. How were you employed prior to that time?
- A. I worked for the Navy for six and a half years as a Quartermann, Roads and Grounds.
- Q. At the present time, where do you perform your services as Towing Locomotive Operator?
- A. At the Pedro Miguel locks.
- Q. Have you ever worked at any other locks?
- A. Yes. Most of my service has been on the Miraflores locks.
- Q. You've had experience at both locks?
- A. Yes.
- Q. How long have you been working at the Pedro Miguel locks?
- A. A year next month.
- Q. As a Towing Locomotive Operator, what are your duties?
- A. To assist the ships through the locks, both mooring them when they are waiting to go through, and then by putting cables aboard them and assisting them through the locks themselves.
- Q. I take it then that you use this towing locomotive, you operate this towing locomotive to perform this task, is that right?
- A. That is right.
- Q. Incidentally, do you have any idea of approximately how many locomotives are utilized at the Pedro Miguel locks?
- A. I can count them up. ... There is 18, I believe.
- Q. Is one of those 18 locomotives your particular assignment?
- A. I am not assigned to any particular locomotive. I usually use a different one every shift.
- Q. How long a shift do you work each day?

- A. Eight hours.
- Q. Now, confining ourselves to the Pedro Miguel locks, how do you enter the lock area?
- A. I come through the main entrance where the security guard is.
- Q. There is a fence there at the entrance and there is a security guard in a booth, is that correct?
- A. That is correct.
- Q. At the Pedro Miguel locks, how many lanes do they have for transiting ships?
- A. Two. East and west.
- Q. So that there would be an east wall, and a west wall and a center wall, is that correct?
- A. That is correct.
- Q. And the locomotive which you could be assigned to on any particular day could be on either of those three walls, is that right?
- A. That is correct.
- Q. Now, I believe you said you work an 8-hour shift, is that right?
- A. That is right.
- Q. Where are you required to be at the start of your shift?
- A. At my locomotive.
- Q. How do you know that?
- A. We have been so informed by a memorandum from the Chief, Locks Division, by the operations supervisor, and it's also in the operation manual.

- Q. Do you happen to know approximately how long the center wall is at the Pedro Miguel locks? ... If you don't know, just say so.
- A. I can give you an approximation by thinking about it because I know the various measurements.
- Q. All right.
- A. Approximately 4,000 feet, from end to end. That's from arrow to arrow.
- Q. You have testified that you are not assigned to a particular locomotive, that you may have a different locomotive each day. How do you find out which locomotive you are going to be operating each day?
- A. We have to look at a board to check in to see what position or what locomotive we are working on.
- Q. At the Pedro Miguel locks, where is this board located?
- A. Actually, at Pedro Miguel locks they have two boards. One is at the main entrance, in the booth, the security area, and the other one on the control house.
- Q. What information is contained on the board in the security booth where the guard is?
- A. The position that I am supposed to work that shift.
- Q. It tells you where your locomotive is located?
- A. That's right.
- Q. And you said that there's another board in the control house, is that what you said?
- A. Yes.

- Q. Where is the control house located?
- A. It's located in Pedro Miguel at the south end of the lock chamber.
- Q. At the south end of the lock chamber?
- A. There is only one chamber at Pedro Miguel.
- Q. Is that on the east wall, or the center wall, or ...
- A. It's the center wall.
- Q. So you have to walk across ...
- A. The miter gates to get to the control house.
- Q. Is the identical information contained on the board in the control house?
- A. Yes, but some possible additional information.
- Q. What is that?
- A. Sometimes, when the men on the previous shift are being held over to work overtime, then they will put information on our name plate in the control house telling us not to relieve in this particular position until the actual hour.
- Q. Is there any check mark or any other activity that you perform with either the board at the security booth or the board at the control house?
- A. They have some small nuts that we put on a screw in the security guard booth, and they have a metal button that we attach to our name plate under the control house.
- Q. Is it your experience, your observation, that the locomotive operators are the ones who affix these nuts and these buttons to these two boards?
- A. Yes, we do.

- Q. The lock master doesn't do that?
- A. No.
- Q. What is your particular practice upon arriving at the Pedro Miguel gate? What do you do first?
- A. Well, I have to check in with the security guard to check my identification and look through my lunch pail, and then I hang the nut on the board.
- Q. You look at the board to see where your locomotive is going to be?
- A. That's right.
- Q. And then what do you do?
- A. And then I walk across to the control house and check that board, and attach the button to my name plate.
- Q. And then what do you do?
- A. Go on to relieve the man on the previous shift.
- Q. From the security gate, what is the greatest distance away that your locomotive could possibly be?
- A. About a 12 to 15-minute walk.
- Q. Where would that be?
- A. It would be very near to either end of the locks, Pedro Miguel locks. This is from the security booth.
- Q. And from the control house what would be the greatest distance that your locomotive might be?
- A. Approximately the same distance as the time for walking would be at the north end of the Pedro Miguel locks.
- Q. Incidentally, you are required to submit to inspection of your lunch bucket at the control gate?

- A. Yes. Any package you carry into the area.
- Q. And every day he checks your identification card, the security guard?
- A. That's right.
- Q. Does he do that with the other Towing Locomotive Operators that you have observed?
- A. Yes. All the men working in the area.
- Q. Now, in your experience at Pedro Miguel has your locomotive ever been located at the further-most position from either the security gate or the control house?
- A. Yes, that happens every once in a while; they are awaiting the arrival of a ship southbound.
- Q. So before you report for work you are not aware of where your locomotive might be, is that correct?
- A. No.
- Q. Do you have to allow a certain amount of time to be able to check the board and still get your locomotive at the start of a shift?
- A. Yes, I do.
- Q. How much time would you have to allow?
- A. I allow myself about 30 minutes from the time I get to the gate.
- Q. But if you were really cutting it to the minimum, Mr. Thornton, how much time would you have to allow?
- A. I could go through all these steps in about 15 or 16 minutes.
- Q. That is 15 or 16 minutes from the time that you get to the gate until the time you report to your locomotive?

- A. That's right. Provided there was no obstructions in the way.
- Q. What kind of obstructions might there be?
- A. Well, the gates, if I had to go to the center wall or the west wall of the chamber, and the gates on the east side were open to allow a ship to enter or leave the locks, then I perhaps would have to wait, sometimes as much as 10 minutes if it's a slow moving ship, or two ships.
- Q. Do you have any way of knowing before you report to work if this type of obstruction will be in effect?
- A. No.
- Q. Have you ever received any form of instruction as to checking the lockage assignment board?
- A. When we first went to work there they told us to check in at the lock assignment board.
- Q. Otherwise you wouldn't know where your duty station was?
- A. That's right, and the lock master wouldn't know if we were there or not.
- Q. Did you have, in your experience as a Towing Locomotive Operator, were you ever required to check in with a timekeeper?
- A. Yes.
- Q. When was that?
- A. I think that ended -- they changed that system of checking in. Previous, they had a timekeeper at the main entrance of both locks. I think the timekeeper system ended in December, 1967.
- Q. You were at Miraflores, I guess, at that time?
- A. At that time, yes.

- Q. What did you have to do with that timekeeper? What was your procedure with him?
- A. You go in the gate and give him our IP number.
- Q. They changed that system in December of '67?
- A. I believe that was the date.
- Q. Did you get any orders that required you to give your IP number to the timekeeper?
- A. Yes.
- Q. Let's now discuss Miraflores locks. You've told us about Pedro Miguel locks. At the Miraflores locks is there also an assignment board?
- A. Yes.
- Q. Where is that assignment board located at the Miraflores locks?
- A. It's under the control house.
- Q. There's not one in the security booth there?
- A. No.
- Q. How many lanes are utilized at the Miraflores locks?
- A. Two.
- Q. Just as Pedro Miguel?
- A. The same.
- Q. Is the control house also located on the center wall at the Miraflores locks as it is at Pedro Miguel?
- A. Yes, sir.
- Q. And approximately how much of a distance is it from the gate at Miraflores to the control house?
- A. Approximately, four to five hundred feet.

- Q. Is the information on the assignment board at Miraflores the same as information that is on the board at Pedro Miguel? Is there anything additional?
- A. It's the same information that's on the board under the control house at Pedro Miguel.
- Q. Is there any notation or mark that you make on the board at Miraflores?
- A. Yes. We attach the same type metal button to our name plate.
- Q. From the control house at Miraflores what would be the greatest distance that your locomotive might be located?
- A. It's approximately the same, either to the north end or to the south end of Miraflores.
- Q. The same as at Pedro Miguel?
- A. No. The distance from the north end to the south end of Miraflores is approximately the same, either end. So either the north end or the south end would be the same distance.
- Q. Oh, I see. The control house is sort of in the center, then?
- A. Yes.
- Q. Approximately how much time would it take to walk from the control house to the end of the wall?
- A. I usually allow myself at least 12 to 15 minutes.
- Q. Are there any obstructions there at Miraflores that you might encounter?
- A. There could be possibly an obstruction in the way by getting to the control house to check the assignment board.
- Q. Why would that be?

- A. A ship going from one chamber to the other, and they would have the gates open.
- Q. At Miraflores, does the guard also check your lunch box?
- A. Yes.
- Q. And your identification card?
- A. That's right.
- Q. Do most of them bring their lunch, the Towing Locomotive Operators that you have observed?
- A. Yes, the majority of them do because we have to eat our lunch on the locomotive. We have no lunch break.
- Q. Are you familiar with a procedure called a "call in on a as soon as possible basis"?
- A. Yes.
- Q. What does that procedure relate to?
- A. Well, if someone gets sick while he is on a lockage and they have to have a man to replace him, or through some emergency he's called away, and they call another operator to come in to replace him.
- Q. They call you up at your home?
- A. That's right.
- Q. Under those circumstances, when does your pay begin?
- A. As soon as you enter the main gate.
- Q. But on a normal day your pay does not begin until you report to your locomotive, is that correct?
- A. That's right.

MR. GRUBER: I have no further questions.

CROSS EXAMINATIONQuestions by Mr. Donlan:

- Q. Mr. Thornton, I will restrict my questions to Pedro Miguel so we don't get confused. I believe you testified that your approximation of the distance, the length of the center lane, the center wall, was some 4,000 feet, is that correct?
- A. Approximately, yes.
- Q. I believe that you said that to walk from the gate to the farthest point took you something like 12 to 15 minutes?
- A. Right.
- Q. The distance from the gate to the farthest point, then, would be something like 2,000 feet, is that correct?
- A. Something on that order, yes.
- Q. Is there anything wrong with you?
- A. No, I'm just kind of hoarse for some reason or other.
- Q. No. I mean is there anything wrong with your legs? Do you have any physical disability?
- A. None whatever, but I never hurry.
- Q. How long does it take you to walk that distance when you get off your shift?
- A. About the same time. I don't hurry off the job either.
- Q. You don't hurry getting to it and you don't hurry getting off?
- A. No, sir. There's no place to go much here.
- Q. You testified that there were two assignment boards, one located at the gate and the other located at the control house, is that right?

- A. That's right.
- Q. And you get your assignment from the assignment board that is located right at the gate, is this correct?
- A. That is just so I'll know where the mule is located, its location.
- Q. As you went through the gate you have to, by the physical set-up, pass by that board, is that right?
- A. That's right.
- Q. My question is: Who ordered you to check the assignment board in the control house?
- A. Well, there is information sometimes on the assignment board in the control house which is not on the other one.
- Q. That wasn't my question. My question is: Who ordered you to check the assignment board in the control house?
- A. I have never received an order of that type.
- Q. You have never been ordered to do that?
- A. No.
- Q. Approximately how long does it take you to place this metal button on your name tag? Your name tag on the assignment board?
- A. A few seconds.
- Q. When you check in, or you go by the assignment board, are you required to indicate the time that you go by there?
- A. No.
- Q. You discussed how far the farthest point from the gate house is that you might pick up your locomotive, how far is the closest point at which you might pick up your locomotive?
- A. From the assignment board?

- Q. From the gate?
- A. That would be approximately 400 feet.
- Q. How long do you think it would take you to walk 400 feet, to the closest point?
- A. Take me about three minutes.
- Q. During the course of your experience at the Pedro Miguel locks, do you find that your locomotive may be in any of these positions located either at the farthest point up to the closest point?
- A. Yes.
- Q. Is there any one position that the locomotive is usually in more than some other position?
- A. It runs about the average, the same.
- Q. The same in almost every position?
- A. Same in almost every position.
- Q. You described the timekeeper, when there was a timekeeper, and at the time that this procedure was in effect, you would go through the gate and yell out your number to the timekeeper?
- A. It wouldn't be necessary to yell out to him because he was sitting in the booth, like you or I, and you'd go by and give him your number, and he wrote it down.
- Q. Was he at the gate?
- A. He was at the gate.
- Q. Was it a physical requirement that you walk by him in order to get through the gate and go into the lock area?
- A. Real close.

- Q. You wouldn't have to deviate from your path?
- A. No.
- Q. How would you identify yourself, or what would you say to him or what would he say to you?
- A. I would stop in front of where he was taking down the numbers and say, "7161." At that time we only had four digits on our numbers.
- Q. Do you know what he did then?
- A. He wrote it down.
- Q. Do you know if he wrote the time down there too?
- A. No.
- Q. Did you ever arrive at the gate after the start of your shift?
- A. I don't believe I have ever been late.
- Q. Do you know if any of the other Locomotive Operators have ever been late?
- A. Yes.
- Q. Do you know if they've ever been docked?
- A. Yes. I know of instances that they have been docked.
- Q. When was the last instance that you know of when someone has been docked?
- A. Well, that should be about 5, 4 or 5 years ago.
- Q. Do you know how late he was, the person who was docked?
- A. About 6 minutes.
- Q. Do you recall what his name was?
- A. A Mr. Lane.
- Q. Is he still employed there?
- A. He's still employed at Miraflores. ... I mean at Pedro Miguel. I'm sorry.

- Q. Now, with respect to Miraflores, you indicated there, I think, that the lockage assignment board is located in the control house?
- A. Underneath, yes.
- Q. And the control house is approximately 400 feet from the gate, is that correct? 400 to 500?
- A. Four to five hundred, yes.
- Q. So it would take the same time, approximately, to walk from the gate to the control house, namely, about three minutes?
- A. No, that's a little closer.
- Q. I beg your pardon?
- A. That's a little closer than Pedro Miguel.
- Q. The gate house is closer?
- A. Yes.
- Q. How far would you say the gate house is from the control house at Miraflores?
- A. About three to four hundred feet.
- Q. How long did it take you to walk from the gate to the control house?
- A. Under perfect weather conditions, two to three minutes.
- Q. Would it take you any longer to walk under different weather conditions, other than perfect?
- A. Yes.
- Q. What would those weather conditions be that it would take you longer?
- A. When it rains sometimes we detour around by the machine shop and walk under the eaves of that and it makes it a little farther.

- Q. Is that the only weather condition that makes it longer -- the rain?
- A. [Nodded affirmatively.]
- Q. Once at the control house here, you indicated you put this metal plate on your name, is this correct?
- A. Yes, this is correct.
- Q. Do you indicate the time there?
- A. No.
- Q. Approximately how long does it take you to place this metal plate on your name?
- A. Just a few seconds.
- Q. How long is the center wall at the Miraflores locks?
- A. It is over 4,000 feet.
- Q. It is longer than the one at Pedro Miguel?
- A. Yes.
- Q. Can you give us an estimate of just how long it is, or how much farther it is?
- A. It should be about 5,000 feet.
- Q. About 5,000 feet?
- A. Yes.
- Q. And you testified that it would take you 12 to 15 minutes to walk to the farthest point?
- A. Yes.
- Q. How long would it take you to walk to the nearest point?
- A. To the nearest point I might get on the locomotive?
- Q. That's right.
- A. Two to three minutes.

- Q. Where would the locomotive be with respect to the control house where it would take you 2 to 3 minutes to get to it?
- A. Are you talking about from the control house or from the gate? I am sorry. I was thinking in terms of the gate. That would be less than a minute.
- Q. At Miraflores it was your experience that these locomotives would be located at varying different points throughout as you would pick them up?
- A. Yes.
- Q. Was there any particular place where one locomotive would be more than some other place?
- A. I don't think so.
- Q. It was pretty evenly divided?
- A. Pretty well.
- Q. You indicated that at Miraflores you ate your lunch in the locomotive, is that right?
- A. That's right.
- Q. Do you also do this at Pedro Miguel?
- A. Yes. If we're on lockage sometimes there's a few minutes break, but no stoppage of lockage.
- Q. Do you always eat your lunch at the same time every day?
- A. No.
- Q. Do you eat it at the same time during your shift each day?
- A. No.
- Q. During a normal 8-hour shift at Miraflores, weren't there times when you were free from your locomotive anywhere from 30 minutes to an hour?

- A. Once in a great while.
- Q. Well, I am talking about every shift?
- A. No.
- Q. Do you have as much as 15 minutes free time off during each shift?
- A. At Miraflores?
- Q. At Miraflores.
- A. Every day?
- Q. Every day.
- A. No.
- Q. There are times when you had no time off?
- A. That is correct.
- Q. How often did that occur?
- A. Quite often in the last few years.
- Q. Is the same thing true at Pedro Miguel?
- A. At Pedro Miguel you have a little more break in between the lockages due to the fact that the chamber has to fill or empty.
- Q. Due to the fact that the chamber has to fill or empty?
- A. Yes. Sometimes you turn a ship loose southbound and you go back to another one going southbound and you have to wait until the chamber refills. But you're not allowed to stop and eat lunch while that's happening because it only takes two or three minutes.
- Q. But if there's not a ship that's ready to come through the locks after you have taken one ship through the locks, you are allowed to leave the locomotive, isn't that correct?

- A. If there's no ship for lockage, that's correct.
- Q. You can do pretty much what you want to do during that period, is that not correct?
- A. That's right.
- Q. You can go to the locker room?
- A. Yes.
- Q. Or eat your lunch?
- A. Right.
- Q. You can do anything you like as long as you are in an area where you can be called as the next ship approaches?
- A. That's right.
- Q. It is your testimony that, as a normal course, you don't have as much as a half hour during each shift where there isn't a ship ready to go through. Is that your testimony?
- A. That's my testimony.

MR. DONLAN: No further questions.

[CONCLUDED, October 29, 1969 - 2:30 p. m.]

I, DALLAS BENTON THORNTON, hereby certify that I have been afforded the opportunity to read and correct the foregoing transcript of the testimony given by me on October 29, 1969, at the Administration Building, Balboa Heights, Canal Zone, consisting of 20 pages, and the testimony as it appears in the foregoing transcript is correct.

ISTHMUS OF PANAMA)
CANAL ZONE)
) SS

Subscribed and sworn to before me this _____ day of

_____, 1969, at _____, Canal Zone.

Notary Public in and for the Canal Zone
My commission expires _____

I, Mary L. Wheeler, Notary Public in and for the Canal Zone, do hereby certify that the deposition of DALLAS BENTON THORNTON, who was first duly sworn by me, was taken at the Administration Building, Balboa Heights, Canal Zone, on October 29, 1969, commencing at 2:05 o'clock p.m., and terminating at 2:30 o'clock p.m., of the same day, and was by me reported stenographically and then reduced to typewriting, and that said deponent was afforded the opportunity to read and correct the transcript of his testimony, which consists of 20 pages.

Mary L. Wheeler
Notary Public in and for the Canal Zone
My commission expires October 20, 1972.

DEPOSITION OF WILLIAM J. BALDWIN DATED 10/29/69

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WADE V. CARTER, et al.,

Plaintiffs,

NO. CA 1890/68

v.

DEPOSITION

THE PANAMA CANAL COMPANY,

OF

Defendant.

WILLIAM J. BALDWIN

APPEARANCES:

Abraham E. Freedman
Stanley B. Gruber, of Counsel
For the Plaintiffs

Robert R. Donlan, Trial Attorney, US
Department of Justice
For the Defendant

Robert J. Park
Attorney-Representative
Panama Canal Company

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October 29, 1969 - 1:30 p. m.

Administration Building
Balboa Heights, Canal Zone

It is stipulated by and between counsel for the respective parties hereto that all objections except as to the form of the questions and/or responsiveness of the answers are reserved to the trial of the case.

WILLIAM J. BALDWIN, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Gruber:

Q. Will you state your name and address, please?

A. My name is William J. Baldwin. I live at House 131-B, Gatun, Post Office Box 291, Gatun, Canal Zone.

Q. Are you employed by the Panama Canal Company?

A. I am, sir.

Q. What is your identification number?

A. My IP is 46655.

Q. What is your present position with the Company?

A. I am a Towing Locomotive Operator.

Q. How long have you held that position?

A. Approximately 12 years, with some broken service in between.

Q. Prior to your service as a Towing Locomotive Operator, where were you employed?

- A. I was a Canal Zone Police Officer.
- Q. How long did you hold that position?
- A. Approximately 5 years.
- Q. Prior to that, what was your employment?
- A. Prior to that, I worked for the United States Navy as a Rigger at the U. S. Naval Ordnance Plant in South Charleston, West Virginia.
- Q. Where do you perform the services as Towing Locomotive Operator?
- A. At Gatun.
- Q. That is the Atlantic Sector, is that correct?
- A. Yes.
- Q. Will you briefly describe the nature of your job as Towing Locomotive Operator?
- A. I operate an electrically operated towing device used to tow ships through the Panama Canal locks.
- Q. These vessels have cables which are secured to the vessels from the locomotives?
- A. Yes. The locomotive has two cables that are used to be secured to the ship, used for the purpose of either towing or breaking, or controlling the lateral movement of the ship within the chamber.
- Q. Is there an entrance at the Gatun locks when you come to work that you go through?
- A. Yes.
- Q. After you get through the entrance, could you describe the general geographical set-up of the Gatun locks? That is, I

understand that there are lock walls, a control house, and other buildings. Can you generally describe the layout there?

- A. Gatun locks consists of two locks chambers running parallel, north and south, for approximately one and one-eighth miles, the total distance of the lock itself. The entrance is in the middle level of the center chamber on the east wall adjacent to the townsite, Locks Road, the townsite of Gatun.
- Q. You said the lock wall ran approximately a mile and three-eights?

A. About a mile and one-eighth.

Q. Are you referring to the center wall?

A. The center wall.

Q. Actually that wall runs a greater distance than the east wing, or the other wing, is that correct?

A. Yes.

Q. Do you work a shift; that is, do you have certain hours which you are required to work as a Towing Locomotive Operator?

A. Yes, sir. I work an 8-hour shift, which rotates weekly.

Q. Have you been instructed, as a Towing Locomotive Operator, as to where you are to be at the time your 8-hour shift begins?

A. Yes, sir. I have always been instructed that I should be at the locomotive at the time of the start of the 8-hour work period.

Q. So that the so-called duty station is your locomotive, is this correct?

A. Yes, sir.

- Q. How have you been so instructed? By what means?
- A. By memorandum from the Chief of the Locks Division; by the Locomotive Operators' Manual; and by other memorandum from supervisors.
- Q. At the Gatun locks, are you assigned to a steady locomotive?
- A. No, sir. It varies with the particular lockage location of where the crew is located; not necessarily any particular locomotive.
- Q. Well, in order to find out what locomotive you are going to be working on on a particular day, what must you do?
- A. I must check the assignment board.
- Q. Where is this assignment board located?
- A. It's located on the south wall of the time office, outside the time office, about 75 feet inside the entrance of the locks enclosure.
- Q. So that when you come through the entrance you must walk this approximately 75-foot distance to the time office and look at the assignment board, is that correct?
- A. Yes, sir.
- Q. And what information do you get from looking at the assignment board?
- A. The assignment board shows me what crew I am assigned to, and to what lock wall I am assigned to. It shows the number, the locomotive position number of the crew that I will be assigned to, and it shows the direction of the lockage in progress.
- Q. When you say "what crew you are assigned to," exactly what are you referring to?

- A. I am referring to either the east lane or the west lane.
- Q. I see. You say it also indicates what direction the lockage is proceeding of that particular locomotive?
- A. Yes, for that particular crew, sir.
- Q. Is there any notation that you make on this lockage assignment board after you have so checked it?
- A. Yes, sir. I check my name. At the side of my name I place a check mark with chalk that is provided for that purpose.
- Q. Is it your understanding that you are required to make such a check mark?
- A. Yes, sir.
- Q. After you have checked the assignment board, what do you do?
- A. I then proceed to the location of the locomotive to which I am assigned and relieve the operator that is going off duty.
- Q. From the time office where the lockage assignment board is located, what is the greatest distance that you will be required to walk to get to your locomotive?
- A. On the center wall at the north end arrow, where we would be receiving a ship at the north end for a south bound lockage.
- Q. Have you had occasion to note how much time it takes you to walk that distance?
- A. I have, sir.
- Q. How long a period of time does it take, under normal conditions?
- A. Under normal conditions it takes me 16 minutes.
- Q. Are there ever any conditions which would increase the amount of time that it takes to walk this distance?

- A. Yes, sir. In case of weather and I duck into a tunnel to get out of a heavy downpour -- that would consume more time; or if a ship should be transiting on the east wall and I had to go to the center wall or the west wall, then I would either have to wait until this ship cleared the gate and the gates were mitered so that I could use the walkway over the gates to get across; or either take the long way around, and go in the opposite direction and cross over at another point in the locks and walk back.
- Q. And this would require more time than the normal 16 minutes?
- A. Yes, sir.
- Q. Of course, it is possible that your locomotive would be at a closer location to the time office, is that correct?
- A. Yes, sir.
- Q. And under those circumstances it would take you less than 16 minutes to walk to your locomotive?
- A. Yes, sir.
- Q. However, is it true that you have no idea where your locomotive is going to be each day when you report for work?
- A. None whatever.
- Q. Now, are you familiar with a practice known as a "call in on a soon as possible basis"?
- A. I am, sir.
- Q. Could you explain to us what that is?
- A. If I received a telephone call at my home to report in as soon as possible, that means that I would leave home just as

soon as I could possible get ready, in case where a man failed to show for work, or someone becomes sick and they needed a man to man the locomotive.

Q. Under those circumstances, when does your pay time start?

A. The moment I enter the lock enclosure.

Q. Is that also true on a normal work day?

A. No, sir.

Q. On a normal work day situation, when does your pay start?

A. My pay starts at the hour of the normal shift operation.

Q. And at that point you are required to be at your locomotive?

A. Yes, sir.

Q. So that even though you must look at the lockage assignment board to determine the information you stated earlier, you do not receive pay for that period, is that correct?

A. That is correct, sir.

Q. Was there ever a time, prior to the present time, when, as a Towing Locomotive Operator, you had to check in with the timekeeper?

A. Yes, sir.

Q. When did that practice terminate?

A. That was terminated in December, 1967.

Q. Prior to that time, what was the practice with regard to the timekeeper?

A. When I entered the lock enclosure, there was a timekeeper present with a form that he noted the time on, and noted my presence, and I called my work check number out to him.

Q. And from there you proceeded to the time office?

A. Yes, sir.

Q. Had you received orders that you were required to check in in this manner with the timekeeper?

A. Yes, sir.

Q. Prior to December, 1967?

A. Yes, sir.

Q. Have you received any orders or publication which would indicate that you are required to check the lockage assignment board?

A. Yes, sir.

Q. What type of instructions have you gotten in that regard, and what shape or form did they take?

A. I have been instructed that I must check the assignment board 15 to 20 minutes prior to the start of a normal work period in order to enable me to reach the duty station by work time.

Q. By whom have you been so instructed?

A. By the former Chief of the Division, Mr. William A. Van Siclen.

MR. GRUBER: You may cross examine.

CROSS EXAMINATION

Questions by Mr. Donlan:

Q. How long does it take you, Mr. Baldwin, to get from your house to the lock area?

A. From my house, I normally ride a motor bike from my house, and it takes me about, I would say, about 5 to 8 minutes.

- Q. Suppose you had to walk?
- A. It would take me considerably longer. I haven't timed it. I very rarely walk.
- Q. You said that the lockage assignment board is located approximately 75 feet from the gate, is that correct?
- A. Approximately that. I have never measured it.
- Q. Do you know how long it takes to walk from the gate to the lockage assignment board?
- A. I would say, oh, one minute.
- Q. With respect to the gate, as you walk through the gate, is the lockage assignment board straight ahead, or is it to the right or to the left?
- A. It is to the right. It's straight ahead and then the sidewalk between the locker room and the time office, you take a right turn.
- Q. Is your lockage assignment board located near the locker room?
- A. Yes, sir. It's on the time office wall, across the walkway from the locker room.
- Q. What is the locker room?
- A. Sir?
- Q. What is the locker room?
- A. That is the area that's used by the men in changing clothes and washing up.
- Q. Is that a normal procedure?
- A. For some people it is and for some it isn't.
- Q. Is it for you?

- A. No, sir. I maintain a locker and I keep work clothes in the locker, but normally, I work in the clothing that I wear to work.
- Q. I see. You testified that you have timed the distance to the farthest point and that came out to be 16 minutes the way you walk, is that right?
- A. Yes.
- Q. Have you timed the distance to the nearest-most point?
- A. No, sir. But I can give you a very accurate estimate.
- Q. But you haven't timed it?
- A. No, sir.
- Q. All right. Would you give us that estimate?
- A. Thirty seconds.
- Q. Now, have you, throughout your experience, your 12 years experience as a Towing Locomotive Operator, found that the locomotive may be in any one of a number of areas when you report to work?
- A. Yes, sir.
- Q. So, is there any way to determine, or is there any system whereby you can tell where the locomotive is going to be?
- A. Prior to coming to work?
- Q. Right.
- A. No, sir.
- Q. Is there any position that it appears more often than not to be in when you arrive?
- A. I wouldn't say any particular position, sir, because the lockage could be at any point. These lockages are scheduled

according to shipping and my position could be anywhere.

Q. Could be anywhere along with respect to distance from the gate?

A. Yes, sir.

Q. When you are in the process of conducting a lockage, that is, working your locomotive, you pick the vessel up at one end of the lock and carry it through to the other end, is that correct?

A. Yes, sir.

Q. Would you tell us then what you do?

A. Well, sir, we prepare to pick up a vessel; we lay our wires out on the wall. When the vessel comes alongside our wires are tied to messenger lines leading to the ship and we feed the wires out while we maintain our position along the side of the ship, whether it's in front of, or to tow, or beside to hold for lateral control, or stern in order to be able to break, we maintain our position and feed the wires out, and they are taken aboard the ship and placed on chocks on the ship. This is assuming that I am on the center wall, and after we get the ship up to where it enters the jaw of the chamber of the locks, the side wall machines, the wires are placed aboard the ship in a like manner, and after the wires are aboard we take directions from the Panama Canal Pilot to assist the ship.

Q. Now, again, when the ship has left the locks, and your lines have been released from the ship, what do you do then?

A. We pick up our wires and we either go north or south, whichever direction the next lockage might be in.

- Q. It very well may be that your next lockage will come from the direction that you are located in, is that not correct?
- A. Yes, sir.
- Q. Are there time intervals between the next lockage?
- A. This also varies. Sometimes you are back, the ship is waiting, tied to the wall. Sometimes the ship is just off the soft nose. Sometimes you have a short interval to wait.
- Q. Sometimes you might have as much as an hour or hour and a half to wait, is that correct?
- A. This is possible, yes, sir. But with the shipping today, that's rather rare.
- Q. During the course of an 8-hour shift, a normal 8-hour shift, isn't it usual that you have about 30 minutes free time to eat your lunch?
- A. We might have 30 minutes free time in an 8-hour period broken up into just a few minutes after we've put our wire out waiting for the next ship.
- Q. No, I mean a continuous period of 30 minutes?
- A. This is unusual, sir, I would say.
- Q. When you say "unusual" what do you mean?
- A. It is very rarely that we wait 30 minutes to receive a ship, sir.
- Q. Do you have breaks as long as 15 minutes?
- A. We have breaks of 15 minutes, yes, sir.
- Q. Is that normal?
- A. No, sir. I wouldn't say it was normal. I would say that prior to about 5 years ago, 5 or 10, well, 5 years ago I

would say that we could count on a 15 minute break between ships -- not necessarily all the time, but at least once or twice during the day.

Q. That was prior to 5 years ago?

A. Yes, sir.

Q. Your testimony is that within the past 5 years it is only on rare occasions that you have had 15 minutes break, is that your testimony?

A. Sir, I would testify that there are occasions when we have a 15 minute break.

Q. Do you have it every day?

A. No, sir.

Q. Do you have it every other day?

A. Truthfully, sir, I could not say that we have it every other day or that we do not have it every other day. We have 15 minute breaks.

Q. Pardon?

A. We do have 15 minute breaks, but how often we have these breaks I couldn't say if we have them every day or every other day. There's days when we might have them 2 or 3 times, but there's days when we don't have them at all.

Q. But you have them more often than you don't have them, isn't that correct?

A. No, sir. I would not say that. Not under the heavy shipping conditions that we have now.

Q. I am talking about within the past 5 years; just so we have your testimony recorded properly. You are saying that more

often than not you do not have a 15 minute break. Is the question clear?

- A. No, sir. It is not quite clear to me.
- Q. I will rephrase the question for you. Is it your testimony than less than 50 percent of the shifts that you work on, you do not get a 15 minute break?
- A. No, sir. I would not testify to that because I don't know.
- Q. Well, you're working there aren't you?
- A. Yes, sir, but I mean this happens some days it would and some days it wouldn't.
- Q. We are trying to be able to tell the court how often it happened. Now you work the shift. I don't.
- MR. GRUBER: I'll have to object to that kind of characterization. I don't think it's necessary.
- Q. You're the only one that can tell us that, if you would try to search your memory and give us some estimate as to how often you get a minimum of a 15 minute break in which you can consume your lunch, or do what you want?
- A. Sir, this would be complete conjecture on my part. I mean, because I don't have an average on it, sir.
- Q. Prior to getting on board your locomotive and beginning to work, Mr. Baldwin, what duties do you perform for the Panama Canal Company?
- A. When I enter the locks area and I check the assignment board and I am assigned a locomotive, I immediately must go to that locomotive and I consider that I am doing a duty at that

time because I have been instructed as to where to go and what to do, and should anything occur on the way, an emergency arise or something, I would be required, in my estimation, to go ahead and take action.

Q. I want to know what duties you are performing? That was the question.

MR. GRUBER: The witness has answered that question. He has stated what duties he feels he's performing.

MR. DONLAN: No, I don't think he has.

Q. I want to know what duties you have performed. Would you just tell us?

A. I have been instructed by that assignment board to report to a locomotive and I am going to that locomotive in order to relieve the operator on duty at that locomotive.

Q. Other than going to the locomotive, is there any other duty that you perform for the Panama Canal Company?

A. If I were requested to ...

Q. I am just asking you what you do, not hypothetical, but what you do between the time that you went through the gate, what duties you perform between the time you enter the gate and the time you get to the locomotive?

A. No other duties than the fact that I am following instructions and going to the locomotive to relieve the operator I am instructed to relieve.

Q. Fine. You testified, I think, that prior to 1967 you made some check mark, or something, on the board?

- A. We have always made a check mark on the board, sir.
- Q. You still do that?
- A. Yes, sir.
- Q. Do you know what the purpose of that check mark is?
- A. It indicates that I am present and that I understand my instructions of my assignment.
- Q. You mentioned a procedure prior to December of 1967 of a timekeeper?
- A. Yes, sir.
- Q. Would you describe for me again -- I am not quite sure I understand what the procedure was that the timekeeper performed and what you did at that time?
- A. When I entered the lock enclosure I gave the timekeeper my check number and he indicated this on his time sheet.
- Q. He indicated what?
- A. Indicated that I was present.
- Q. That you were present. Did you ever arrive at the gate subsequent to the time that your shift began?
- A. Yes, sir. ... You mean before?
- Q. No.
- A. After?
- Q. After.
- A. No, sir. I have never been late. ... Yes, sir. I beg your pardon. I have been late. I have been late two or three times.
- Q. Were you docked pay for that?
- A. No, sir.

- Q. Is there any other way that it's physically possible for you to get to your locomotive without going through the gate which you described?
- A. No, sir. The place is fenced in.
- Q. Do you know why it's fenced in?
- A. To keep unauthorized personnel out.

MR. DONLAN: All right. That's all I have.

REDIRECT EXAMINATION

Questions by Mr. Gruber:

- Q. Mr. Baldwin, do you consider checking the lockage assignment board a duty?
- A. Yes, sir.
- Q. Could you get to your locomotive without checking that board?
- A. No, sir, because I wouldn't know where to go unless I looked at the board and saw my assignment.
- Q. You couldn't perform your duties unless you checked that board, is that correct?
- A. Yes, sir. That is correct.

MR. GRUBER: No further questions.

[CONCLUDED, October 29, 1969 - 2:00 p.m.]

I, WILLIAM J. BALDWIN, hereby certify that I have been afforded the opportunity to read and correct the foregoing transcript of the testimony given by me on October 29, 1969, at the Administration Building, Balboa Heights, Canal Zone, consisting of 17 pages, and the testimony as it appears in the foregoing transcript is correct.

ISTHMUS OF PANAMA)
) SS
CANAL ZONE)

Subscribed and sworn to before me this _____ day of
_____, 1969, at _____, Canal Zone.

Notary Public in and for the Canal Zone.
My commission expires _____

I, Mary L. Wheeler, Notary Public in and for the Canal Zone, do hereby certify that the deposition of WILLIAM J. BALDWIN, who was first duly sworn by me, was taken at the Administration Building, Balboa Heights, Canal Zone, on October 29, 1969, commencing at 1:30 o'clock p.m., and terminating at 2:00 o'clock p.m., of the same day, and was by me reported stenographically and then reduced to typewriting, and that said deponent was afforded the opportunity to read and correct the transcript of his testimony, which consists of 17 pages.

Mary L. Wheeler
Notary Public in and for the Canal Zone
My commission expires October 20, 1972.

DEPOSITION OF FRANK R. COSTANZO DATED 10/30/69

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WADE V. CARTER, et al.,

Plaintiffs,

v.

THE PANAMA CANAL COMPANY,

Defendant.

NO. CA 1890/68

DEPOSITION

OF

FRANK R. COSTANZO

APPEARANCES:

Abraham E. Freedman
Stanley B. Gruber, of Counsel
For the Plaintiffs

Robert R. Donlan, Trial Attorney, US
Department of Justice
For the Defendant

Robert J. Park
Attorney-Representative
Panama Canal Company

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October 30, 1969 - 10:10 a. m.

Administration Building
Balboa Heights, Canal Zone

It is stipulated by and between counsel for the respective parties hereto that all objections except as to the form of the questions and/or responsiveness of the answers are reserved to the trial of the case.

FRANK R. COSTANZO, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Donlan:

Q. Would you state your full name and address for the record, please?

A. Frank R. Costanzo.

Q. What is your address?

A. Mailing address or home address?

Q. Home address.

A. My home address is 2487-B, Pyle Street, Balboa, Canal Zone.

Q. Where are you employed, Mr. Costanzo?

A. At the Miraflores locks.

Q. In what capacity?

A. As a Towing Locomotive Operator.

Q. Describe, briefly, your duties as a Towing Locomotive Operator?

- A. My job is to keep the ships in the center of the chamber and assist in getting the ships through the locks in a safe manner.
- Q. Do you do this by operating a vehicle?
- A. The towing locomotive, yes, sir.
- Q. How long have you been employed in this particular position?
- A. I would say between 11 and 12 years. The exact date I am just not sure.
- Q. Have you also worked at Pedro Miguel locks?
- A. Yes, sir. I have.
- Q. How many shifts are there for a locomotive operator?
- A. Shifts or ships?
- Q. Shifts?
- A. I'm sorry. Let's see. At Miraflores there are two crews 8:00 to 4:00; there are two crews from 4:00 to 12:00; there are two crews 12:00 to 8:00; and then we have four operators, which consists of a crew, that work 6:00 in the morning until 2:00 in the afternoon, and another four which would work from 2:00 in the afternoon until 10:00 in the evening. So I would say there's 2 - 4 - 6 - would you say 8?
- Q. Upon reporting for work, where are you required to report?
- MR. GRUBER: Are you referring now to Miraflores or Pedro Miguel?
- MR. DONLAN: I am referring to both, if there's any difference with respect to the place of reporting at Pedro Miguel or Miraflores.
- A. Well, let's take Miraflores, if you will.

- Q. All right. Fine. Let's restrict the questions I ask you now to Miraflores.
- A. Well, I can tell you about Pedro Miguel too, having worked there.
- Q. All right. But let's just talk now about Miraflores.
- A. Miraflores. At Miraflores, I am to check in at the control house. They have a board with my name and position for that day's assignment.
- Q. Where is the control house located with respect to the gate?
- A. The control house, from the gate, is, I would say, about 500 feet from the gate.
- Q. Once you get to the control house, what do you do then?
- A. I make out my time sheet for that day and turn that in.
- Q. You make out a time sheet?
- A. A time sheet.
- Q. What is a time sheet?
- A. It has the date, the day of the week, the time that I am reporting in, and the time that I will report out. It has my IP number, which is an identification number -- a pay number they call it, and the hours from 8:00 to 4:00. If we take 8:00 to 4:00 I put down on this time sheet, "8:00 to 4:00," and under "40", which means Towing Locomotive Operator, I put "8 hours," and then I sign it. And then I put it in the slot. Depending on the shift that I am reporting in, it goes into a designated slot.
- Q. And then what do you do?

- A. Then I check in at the board. We have a little button of some sort to indicate that this man has reported for work, because the lock master at that time might not be under the control house, and the only way that he knows that you have come in is by this little button that you have put on your name. And then I go out and relieve.
- Q. Where do you pick up your locomotive, or where do you relieve the prior shift?
- A. Where do I relieve the prior shift that I come in to relieve? Wherever the locomotive is located. It may be at the control house at that particular time; it may be at the north end; or it may be at the south end. That is something that I don't know until I look at the cones. The cones on the control house will indicate whether it is a southbound lockage or whether it is a northbound lockage. And it also indicates on the board whether you relieve the east side or whether you relieve the west side. And then it's up to me to go out of the control house and see whether the ship is coming this way or going that way, the direction it is traveling in, and then go to my location.
- Q. Now how far is the farthest location that you could possibly go to to pick up your locomotive?
- A. Starting from the control house?
- Q. Yes.
- A. Well, you would go at the end of the wall, the center wall, which is the furthest distance -- the side walls are a little shorter -- but the center wall, taking the center wall, from

the control house to the north end of Miraflores locks, the chamber is a thousand feet long. Then you have the approach wall from the chain to the end of the wall, of the approach wall, which is 1,200 feet long. Then, from the end of the gate, in the north end, to the chain, you have another 500 feet. So I would say a thousand, twelve, that's 22, I would say 2,700 feet.

Q. The locomotive is never located at the very end of the center wall, is it?

A. It is sometimes.

Q. Isn't that where you have to switch and turn around?

A. Well, now, when I say 1,200 feet, I don't mean right to the very end of the wall. 1,200 feet is the end of the track where the locomotive would be locating waiting for a ship to approach.

Q. I see.

A. Then you do have it, but there's no reason for me to go any further because from then on you have a turn-table, and the arrow, and your gang, your boat handlers or your line handlers, or whatever you want to call them. And there you have, maybe, about another 150 feet, but there's no reason for me to go that far because the end of the track is where the locomotive is waiting for a ship that's making an approach. That's as far as I can go.

Q. You said that distance was approximately how far?

A. From the control house, I would say a thousand and 12, that's 27, and another 500 from the chains to the north end gate, let's say 28 to 3,000 feet.

- Q. Do you know approximately how long it takes you to walk that distance?
- A. I would say anywhere between 10 to 15 minutes. It might take me 11, it might take me 12, but within that distance.
- Q. Now, when the locomotive is at its closest point to the control house, how long does it take you to get to it?
- A. Well, at the closest point would be right at the control house. You'd come right out of the door and step in. It should be less than a minute.
- Q. Between those two extremes, in other words, the farthest end of the center wall and right next to the control house, could the locomotive be at any other intermediate point?
- A. Yes it can. If the ship -- yes, it can.
- Q. Do you find, has it been your experience that the place where you find the locomotive is evenly distributed between those points?
- A. Can we use the figure 100 percent?
- Q. All right.
- A. I would say that 60 percent of the time that it is at the far end of the wall. Now that leaves us 40 percent. Of that 40 percent, I would say that 25 percent of the time it is between the far end of the wall and the control house. That leaves us 15 percent. 15 percent of the times I would say that it is at the control house.
- Q. When you go to get off your shift, when you are being relieved, if you are not engaged in an actual lockage, do you make an effort to place the locomotive where it will be in the easiest and closest position for your relief?

- A. Now I am not on a ship?
- Q. No, you're not actually involved in a lockage.
- A. Right.
- Q. Do you take your locomotive to a point where it would be closest for the relief man?
- A. Well, that question would have to be answered yes and no. The yes answer would be: they have a designated spot that they call, "Put your locomotive on the spot." It's, I would say, about a hundred feet from the control house. Now, when I say no, it is sometimes that this particular car has to have some work done on it, maybe the cables greased, and I'll be asked to run this car to the far end of the wall where the mechanics will be working on it or checking something out. My relief could be in and he would have to walk out to that far end in order to relieve me, or vice versa if I am relieving someone else.
- Q. How about when your locomotive is on the east or west wall?
- A. The east or west wall? Are you referring to the center wall or the side wall?
- Q. The east or west wall, not the center wall.
- A. There's two east walls and two ...
- Q. The east side wall?
- A. The east side wall, and the west side wall?
- Q. Right.
- A. The two shorter walls, not the long center wall?
- Q. Right.

- A. Wing walls, they call it.
- Q. All right, the wing walls. Is this also true, this procedure which you've just outlined, when your locomotive is on one of the wing walls?
- A. In what respect?
- Q. In respect to your positioning it for your relief, or change of relief?
- A. If I am not on a lockage, the locomotive will be put on a spot even with the center wall. They have a red marking there; they call it "the spot". We park the car here on the center wall, and the man on the opposite side on the side wall, whether it be east wall or west wall, will park his straight across from it.
- Q. Where is that position with respect to the control house?
- A. That would be, I would say, 250 feet, because I am closer to the control house on the center wall. The gates are 110 mitered, and then I have another hundred and some feet to walk to the locomotive. So my distance would be a little longer from the side wall when I park the locomotive.
- Q. With respect to eating your lunch during your shift, do you generally get a period of time when you leave the locomotive to eat your lunch?
- A. We do not have what you call a designated ...
- Q. No, I am not talking about a designated, fixed time. I am talking about anytime within your 8-hour shift that it occurs that you can leave your locomotive and eat your lunch?

- A. If we have a sit-out, we can eat our lunch. If we don't have a sit-out, we just eat on the fly.
- Q. What do you call a sit-out?
- A. Well, let's say you have an average of 44 or 42 ships a day now locking through the canal. If you have a 20 minutes, or a 30 minute, or a half hour's break sometime, where one ship is slow getting up, then they say, "Put your locomotive on the spot." And I'll be put on the spot with the locomotive and I can eat my lunch then, but if I reported at 8:00 o'clock in the morning, I sure don't want to eat my lunch at 8:30 or 9:00 o'clock.
- Q. How often does it occur that you have these so-called breaks?
- A. These so-called sit-outs?
- Q. Sit-outs, right.
- A. Well, that's hard to tell actually. It's all depending on the shipping. That is all I could say to that question.
- Q. Do you usually get at least one sit-out of 30 minutes during a particular shift?
- A. Well, I have gone for weeks and a month without one sit-out.
- Q. You have?
- A. Yes, sir.
- Q. During the time that you do have a sit-out, you are free to leave the locomotive?
- A. Yes, sir.
- Q. What restrictions are placed on you with respect to where you can go and what you can do during this sit-out?

- A. Well, I can sit under the control house; or I can have a cup of coffee; or I can eat my lunch if it's a particular time, you know, that I have been there a few hours; or I can sit in the mess hall; or, once a week we have a safety talk given to us by the lock master under the control house, and the only time we can schedule these safety talks are during these sit-outs because they are not going to stop lockages to give safety talks.
- Q. How can you have one once a week if you don't have ...
- A. If we have a sit-out. They try to get one in a week with each crew. I'm sorry. I should have said that.
- Q. But if you have a week in which there's no sit-outs, then there is no safety meeting?
- A. No safety meeting, no.
- Q. With respect to Pedro Miguel, are there any differences in the reporting procedures at Pedro Miguel than those that you have outlined for Miraflores?
- A. At Pedro Miguel they have the board at the gate. You check in at the gate and then you report to the control house because sometimes, at the control house, on your name you will find a tag that says, "Do not relieve," because the man that you're supposed to relieve is going to be held overtime. Now, it is not at the gate, so I have to report to the control house in order to find this out.
- Q. Doesn't the man who is to be relieved know that he is not to be relieved?

- A. Yes, sir. He does because he is told by the lock master over the radio that, "You four men," or "You two men," whichever the case may be, "You will be working overtime today." So, in order for me to know it, I have to go to the control house where they put the tag on that says, "Do not relieve."
- Q. You could go to the locomotive, could you not, and the man would tell you?
- A. The policy has been to report to the control house.
- Q. Has anyone ordered you to report to the control house at Pedro Miguel?
- A. Well, no one has ordered me to report to the control house at Pedro Miguel, but there's no way I can find out whether I'm going to relieve or not.
- Q. Could you find out from the man you are scheduled to relieve?
- A. Well, can I answer it this way?
- Q. Anyway you like.
- A. Instead of just a plain yes. Let's say that the locomotive that I am relieving is at the south of the north end of Pedro Miguel. So I decide, instead of going to the control house I will go out to the locomotive. So I've walked now the distance that I've mentioned, cutting the chamber, of course, I would go from the gate, across the upper gates, if they are closed, and walk to the end of the center wall. Then I get in and this fellow says, "Oh, you're not supposed to relieve me." So then I turn around and I have to walk back to the control house. So, to me, I'm just doing a lot of walking when I can find out by just going to the control house first.

- Q. With respect to your standby times, or times when you are permitted to leave the locomotive, is the procedure the same at Pedro Miguel as it is at Miraflores?
- A. Yes, sir.
- Q. Do you get any more break periods at Pedro Miguel than you do at Miraflores?
- A. I would say no. If anything, I believe it would be less at Pedro Miguel because of the chamber being filled. There's a spot there when you let go of the ship the gates have to close. You have one chamber at Miguel, and it takes about 7 to 8 minutes to fill the chamber. Now, if this next ship is on the wall, you can't leave him hanging. You've got to get up there in order to get on. So I would say it balances out about even, and maybe a little less at Pedro Miguel due to the fact that the ship should be held against the wall because when the water is going into this chamber it creates quite a current, and it's good policy to have the locomotives up there and get on with the cables as fast as you can possibly get up.
- Q. Do you know approximately how long it takes to run a ship through Pedro Miguel?
- A. How long it would take to run a complete lockage from arrow to arrow?
- Q. Right.
- A. Well, let's see. There again you can't set a time because it depends on the size of the ship. If you have a super tanker, it's going to be slower. If you have a smaller, a tuna boat, it's going to be a little faster. Some approaches from the

arrow to the chain take longer than it does for some small ship to go from arrow to arrow. So I can't actually give you a set time on it. I could say that once the ship is in the chamber and the gates are closed, and it takes 7 to 8 minutes to lower the ship, then, again depending on the size of the ship, whether he's going out fast or whether he's going out slow. So I can't actually really give you a set time on it.

MR. DONLAN: Okay. Thank you. That's all.

CROSS EXAMINATION

Questions by Mr. Gruber:

- Q. Mr. Costanzo, you were talking about making out a time sheet?
- A. Yes, sir.
- Q. Am I clear on that, did you make that time sheet out at Miraflores at the same time that you checked the assignment board, before reporting to your locomotive?
- A. Well, let's say I could either check in first and then make out the time sheet, or I could make out the time sheet and then check in. And the same thing is done at Pedro Miguel.
- Q. It is the same thing, then?
- A. The same procedure.

MR. GRUBER: That's all.

REDIRECT EXAMINATION

Questions by Mr. Donlan:

- Q. Does every locomotive operator fill out a time sheet, do you know?

Q. Yes, sir. Every one. And I might add, you might want to ask, "Well, why don't you make it out at the end of the shift?" There's a reason for that.

Q. Pretend I did ask that.

A. Well, I will volunteer it anyway.

MR. GRUBER: I'll ask it if he doesn't.

A. Now, the lock master has to check these time sheets and then turn them in. If I wait until the end of the shift and I get relieved, well, then this lock master might be relieved and on his way out the gate and who signs my time sheet? So it's a policy to make it out at the beginning of a shift. And if there is any overtime, they will add the overtime.

Q. Suppose you get sick and have to go home before the end of the shift?

A. The lock master will make the change.

Q. He makes the change?

A. Yes, sir. The time sheet is not official until your supervisor, which happens to be the lock master at this particular time, signs your time sheet.

MR. DONLAN: Thank you. That's all.

[CONCLUDED, October 30, 1969 - 10:35 a. m.]

I, FRANK R. COSTANZO, hereby certify that I have been afforded the opportunity to read and correct the foregoing transcript of the testimony given by me on October 30, 1969, at the Administration Building, Balboa Heights, Canal Zone, consisting of 14 pages, and the testimony as it appears in the foregoing transcript is correct.



ISTHMUS OF PANAMA)
CANAL ZONE)
) SS

Subscribed and sworn to before me this 24th day of
December, 1969, at Ancon, Canal Zone.

Mary L. Wheeler
Notary Public in and for the Canal Zone
My commission expires October 20, 1969

I, Mary L. Wheeler, Notary Public in and for the Canal Zone, do hereby certify that the deposition of FRANK R. COSTANZO, who was first duly sworn by me, was taken at the Administration Building, Balboa Heights, Canal Zone, on October 30, 1969, commencing at 10:10 o'clock a.m., and terminating at 10:35 o'clock a.m., of the same day, and was by me reported stenographically and then reduced to typewriting, and that said deponent was afforded the opportunity to read and correct the transcript of his testimony, which consists of 14 pages.

Mary L. Wheeler

Mary L. Wheeler
Notary Public in and for the Canal Zone
My commission expires October 20, 1972

DEPOSITION OF WILLIAM J. McLAUGHLIN, JR. DATED 10/30/69

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WADE V. CARTER, et al.,

Plaintiffs,

NO. CA 1890/68

v.

DEPOSITION

THE PANAMA CANAL COMPANY,

Defendant.

OF

WILLIAM J. McLAUGHLIN, JR.

APPEARANCES:

Abraham E. Freedman
Stanley B. Gruber, of Counsel
For the Plaintiffs

Robert R. Donlan, Trial Attorney, US
Department of Justice
For the Defendant

Robert J. Park
Attorney-Representative
Panama Canal Company

80a

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Name	Direct	Cross	Redirect	Recross
William J. McLaughlin, Jr.	1-7	7-9	9	9-10

October 30, 1969 - 10:35 a. m.

Administration Building
Balboa Heights, Canal Zone

It is stipulated by and between counsel for the respective parties hereto that all objections except as to the form of the questions and/or responsiveness of the answers are reserved to the trial of the case.

WILLIAM J. McLAUGHLIN, JR., being first duly sworn, testified as follows:

DIRECT EXAMINATIONQuestions by Mr. Donlan:

Q. Will you state your full name and address for the record, please?

A. William J. McLaughlin, Jr.

Q. And your address, please?

A. Mailing address?

Q. Home address. Is there a difference between home address and mailing address?

A. My address is Post Office Box 397, Marguerita. My home address is 0359 France Road, France Field.

Q. Where are you employed?

A. I am employed at the Atlantic Branch Locks Division, Gatun.

Q. In what capacity?

A. Foreman, Lock Operations, known in the Division as Operations Supervisor.

- Q. Could you tell us briefly what your duties and responsibilities are in that position?
- A. I am in charge of the operating force and responsible for the manning to transit ships through Gatun locks.
- Q. What categories of operating personnel at Gatun locks are under your supervision?
- A. All operating personnel, which includes Lock Masters, Control House Operators, Towing Locomotive Operators, Lock Operators, Line Handlers, Locomotive Helpers, Boatmen, and Foremen, Lock Operations.
- Q. With respect to the Towing Locomotive Operators, what shifts do they work at Gatun locks?
- A. Operating personnel work 3 shifts, 8 to 4; 4 to 12; 12 to 8, 7 days a week.
- Q. Where are the Towing Locomotive Operators required to report at the beginning of their shift?
- A. Towing Locomotive Operators are required to report to a duty station which is a locomotive.
- Q. How do they know on each shift which locomotive to report to?
- A. The Gatun locks runs, roughly, north and south. The main gate is on the east. All operators come through the main gate. Just beyond the main gate, on the south wall of the time office there is a blackboard. The blackboard indicates "East Crew"; "West Crew". It's numbered "1", "2", "3", "4". Alongside of each number there is a name. The names consist of the personnel of the incoming crew, and the number indicates the position of the locomotives which they will relieve. At the

bottom of the board there's generally more detailed information. Relieve on the 4 car, 6 car, tandem, or if the services of the particular operator is not required on lockage in progress, if the 5 and 6 locomotives are on the return track at the north end or at the south end -- this designates their duty station.

- Q. How far is this board located from the gate entrance to the lock area?
- A. Thirty paces.
- Q. From that board to the farthest place where a Locomotive Operator would find his locomotive, could you tell us the distance?
- A. In time or in ...
- Q. In feet first.
- A. 3,000 feet, approximately.
- Q. Have you had occasion to walk this distance?
- A. Yes, sir.
- Q. Did you time how long it takes you to walk this distance?
- A. Yes, sir.
- Q. Would you tell us approximately how long it took?
- A. Approximately 11 minutes.
- Q. From the board, where is the closest place that an Operator would locate, or find his locomotive?
- A. The closest possible place would be 15 to 20 paces.
- Q. Approximately how long would it take to walk that?
- A. Fifteen seconds.

- Q. In your experience, are locomotives -- the place where a locomotive would be at the beginning of the shift -- evenly distributed between those two extremes?
- A. I would say so. The locomotives may be in this particular position, which is the shortest possible distance, or it could be in the other, or any place in-between.
- Q. Is there any particular place that it would be found more often than any other?
- A. I think not.
- Q. Are there times at the Gatun locks when there are no lockages in actual progress?
- A. There are times when there are no lockages in progress on one side, or the other, or both.
- Q. At the times when there are no lockages in progress, what duties are required of the locomotive operators?
- A. This would depend upon the amount of time involved. Were it a very short period, they would report to their duty station and wait for the next shift. *Ship Master* If the schedule that we get from Marine Traffic Control showed that we would be idle for two hours or more, they would be assigned maintenance duties which consist of cleaning the locomotives, greasing cables, practice in emergency flood control procedures, and things of this nature.
- Q. And if the time were less than two hours, what would they be required to do?
- A. If the time were less than two hours, normally the Lock Master holds a safety meeting -- an operational type talk.

- Q. Are the men, during such periods, allowed to eat their lunches or do other things of that nature?
- A. Yes. They can eat their lunches or make telephone calls or whatever they want. It is quite an informal arrangement here.
- Q. In your experience, approximately how often would they have these periods when there were no lockages? A period of say at least a half an hour?
- A. For a full crew this would be comparatively infrequent. For some members of a crew this happens every shift, maybe several times. The reason for this is we are manned for 12 operators. The bulk of the shipping, approximately 50 percent or more, are 4-locomotive lockages. So there is always, almost always, some slack motion.
- Q. When you said "For a full crew" -- my question is not directed to a whole crew, or a whole shift simultaneously having this half hour. My question is directed as to whether a particular group, or a particular man, during the course of his shift, would have idle time of at least a half hour? How often that would occur per individual man? Is that question clear?
- A. I think so, but I am trying to come up with a figure and that is a little more difficult. Idle time for an individual in a crew would be, on some days he might have 2 or 3 standby periods during lockages; and other days he could have none. *Ex: 2 or 3 days*
It depends upon the mixed traffic mix we have.
- Q. Has there been conducted by the Panama Canal Company any crew, locomotive crew, manpower utilization studies?

- A. The Executive Planning Staff has just completed a rather comprehensive study of the Locks Division, including the Locomotive Operators.
- Q. For the Towing Locomotive Operators under your control at Gatun, how much of their time is actually utilized in operating locomotives?
- A. The figures in the study for utilization of Towing Locomotive Operators is 71 percent.
- Q. What duties, if any, do you require of Locomotive Operators prior to their reporting to their locomotive?
- A. There are no duties required of an Operator prior to reporting to his locomotive.
- Q. What is the purpose of this assignment board which is located just inside the gate?
- A. The purpose of the assignment board is to indicate to the incoming operator where he will work for his shift and where the lockage in progress is to be located, or is located.
- Q. Is there any other purpose of the board?
- A. I can think of none.
- Q. Is the operator required to make any marks, or make any entries on the board?
- A. No, sir.
- Q. Is the board utilized to determine whether an operator is late reporting for duty?
- A. No, sir.
- Q. How is it you determine whether someone is late for his shift?

- A. The man in charge of the crew, the Lock Master, works on the center wall. The operators report to the locomotive which may be adjacent to the Lock Master or may be a considerable distance away. The other half of the operators report to the side wall. The Lock Master may not necessarily know that a man hasn't arrived on time unless the operator who has been relieved late makes some sort of complaint. The Lock Master may not even be aware of this, and we go along ...
- Q. Well, then, one would not be docked for being late unless the Towing Locomotive Operator whom he relieved made a complaint?
- A. Yes, this is true, and even then, rarely is a man ever docked for being late.
- Q. Do you recall the last time a man was docked at Gatun for being late?
- A. I do not recall this.

CROSS EXAMINATION

Questions by Mr. Gruber:

- Q. Mr. McLaughlin, the Towing Locomotive Operators are required to check an assignment board before reporting to their duty station, isn't that correct?
- A. No, sir.
- Q. Well, how are they going to determine where their locomotive is unless they check this board?
- A. Are you talking about checking in the physical sense, or in the visual sense?

- Q. I'm sorry. I mean in the visual sense, not the physical sense.
- A. Exactly. They have to look at this board as they go by to determine where their locomotive is located.
- Q. Then they are required, as you say, to look at the board to see what their assignment is before they report to their duty station?
- A. That's the only way they have of knowing where they will be working.
- Q. I want to show you a document which has been identified as Plaintiff Exhibit Number 2, for identification, in a prior deposition of Mr. Seeley, I believe it was. With particular reference to the second page, the portion which refers to, among other jobs, Towing Locomotive Operators. I would like you to read that portion and tell me if you agree that is a correct statement? ... And certainly you may look at the whole document, you may be familiar with it. [Handed document to witness.] Do you see that portion I am referring to?
- A. No.
- Q. Starting here with Towing Locomotive Operators, in the middle of the page, on Page 2.
- A. Is this check still visual or are you talking about ...
- Q. Only visual, sir. I am not talking about making any physical marks.
- A. Operators and helpers are required to check in at the main gate, or check in at the ...
- Q. Assignment board.
- A. assignment board.

Q. Incidentally, have you ever seen this document before?

A. No, sir. I haven't.

MR. GRUBER: That is all I have.

REDIRECT EXAMINATION

Questions by Mr. Donlan:

Q. Mr. McLaughlin, directing your attention to this document, in the first full paragraph there, which is "General Practice," the last sentence, which says, "The relief crew proceeds to the main gate and is allowed to check out up to 20 minutes prior to the end of the shift." Is that practice still in effect?

A. Yes, sir.

Q. If a crew has standby time; in other words, you know that there's not going to be a lockage during the last 20 minutes of their shift, are they permitted to leave early?

A. Yes. ... Yes.

Q. What is the maximum amount of time they are permitted to leave early?

A. Twenty minutes.

MR. DONLAN: I have no further questions.

RECROSS EXAMINATION

Questions by Mr. Gruber:

Q. Was your testimony that, in the event there are no lockages foreseen at the end of a shift, a locomotive may be left unattended for 20 minutes?

A. Yes, sir.

Q. The only other situation where a man could leave 20 minutes earlier would be if his relief voluntarily shows to relieve him early, is that correct?

A. Yes, sir.

Q. No one is required to relieve 20 minutes early, are they?

A. No, sir.

MR. GRUBER: That's all I have.

[CONCLUDED, October 30, 1969 - 10:55 a. m.]

I, WILLIAM J. McLAUGHLIN, JR., hereby certify that I have been afforded the opportunity to read and correct the foregoing transcript of the testimony given by me on October 30, 1969, at the Administration Building, Balboa Heights, Canal Zone, consisting of 10 pages, and the testimony as it appears in the foregoing transcript is correct.

W.J. McLaughlin, Jr.

ISTHMUS OF PANAMA)
CANAL ZONE)
) SS

Subscribed and sworn to before me this 24th day of
December, 1969, at Ancon, Canal Zone.

Mary L. Wheeler
Notary Public in and for the Canal Zone
My commission expires October 20, 1972

I, Mary L. Wheeler, Notary Public in and for the Canal Zone, do hereby certify that the deposition of WILLIAM J. McLAUGHLIN, JR., who was first duly sworn by me, was taken at the Administration Building, Balboa Heights, Canal Zone, on October 30, 1969, commencing at 10:35 o'clock a.m., and terminating at 10:55 o'clock a.m., of the same day, and was by me reported stenographically and then reduced to typewriting, and that said deponent was afforded the opportunity to read and correct the transcript of his testimony, which consists of 10 pages.

Mary L. Wheeler

Mary L. Wheeler
Notary Public in and for the Canal Zone
My commission expires October 20, 1972.

TESTIMONY OF T. H. HOENKE DATED 3/2/70
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

-----x
WADE V. CARTER, et al., :
Plaintiffs :
v. : Civil Action
THE PANAMA CANAL COMPANY, : No. 1890-68
Defendant :
-----x

Washington, D. C.

Monday, March 2, 1970

The above-entitled cause came on for trial before the
HONORABLE HOWARD F. CORCORAN, United States District Judge,
at 1:45 p.m.

APPEARANCES:

On behalf of the Plaintiffs:

STANLEY B. GRUBER, ESQ., and
A. FRED FREEDMAN, ESQ.

On behalf of the Defendant:

ROBERT R. DONLAN, ESQ.,
Attorney, Department of Justice

C O N T E N T S

<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Truman H. Hoenke	3	21	31	34, 38

EXHIBITS

<u>Defendant's:</u>	<u>Identification</u>	<u>In Evidence</u>
No. 1 - Gatun Locks Area plat	3	8
No. 2 - Pedro Miguel Area Plat	3	10
No. 3 - Miraflores Area Plat	3	11
No. 4 - Document, Oct. 20, 1969	11	13
No. 5 - Document, Oct. 18, 1954	11	14

EXCERPT OF PROCEEDINGS

* * * * *

MR. DONLAN: Mr. Hoenke, please.

Whereupon,

TRUMAN H. HOENKE

called as a witness on behalf of the defense, having been first duly sworn, was examined and testified as follows:

MR. DOLAN: Would you mark these as exhibits, please?

THE DEPUTY CLERK: Defendant's Exhibits Nos. 1, 2 and 3 for identification.

(Plats were marked Defendant's Exhibits Nos. 1, 2 and 3 for identification.)

DIRECT EXAMINATION

BY MR. DOLAN:

Q Mr. Hoenke, will you state your full name and home address for the record, please?

A My name is Truman H. Hoenke. I live at 118 Ridge Road, Balboa Heights, Canal Zone.

Q Where are you employed, Mr. Hoenke?

A I am employed by the Locks Division of the Panama Canal Company.

Q How long have you been so employed?

A Since July of 19-- Since August of 1948. I was initially employed by the Panama Canal Company in July, 1939.

Q In what area did you work when you first became employed with Panama Canal Company?

A I was employed by an engineer in the Office Engineering Division.

Q When did you go to the Locks Division?

A I transferred to the locks in August 1948.

Q In What capacity were you employed in the Locks Division?

A My initial capacity was that of engineer and under-study for a branch superintendent.

Q In what lock were you employed at that time?

A At Pacific locks.

Q Which would be what lock?

A The office was at Pedro Miguel.

Q What were you duties as an engineer in the Locks Division?

A We made engineering studies in connection with plant modifications and improvements, and I also relieved the superintendent of Pacific locks during the periods when he was on vacation.

Q Did your duties as engineer require you to observe the operation of lockages and the operation of the towing locomotives?

A Yes. I spent a large amount of time in the field and when relieving the superintendent, I was responsible for

overall operations that were made in the South Pacific Locks.

Q Did that include the operations of the towing locomotive operations?

A Yes.

Q How long were you employed as an engineer, approximately?

A Until February 1951.

Q Where were you employed then?

A I was then re-rated to Superintendent of Pacific Branch, Locks Division.

Q How long were you employed as the superintendent in the Pacific Branch?

A Until May of 1966.

Q At which time you became what?

A I became Chief of the Locks Division.

Q Will you tell the Court briefly what your duties and responsibilities are as Chief of the Locks Division?

A I am in general charge of the administration of the Locks Division which is responsible for operation and maintenance of all locks in the Panama Canal.

Q Does that include a responsibility with respect to the towing locomotive operation?

A Yes.

Q I will show you what has been marked Defendant's Exhibit 1 for identification, and ask you if you can tell the

Court what that is?

A (Perusing exhibit.) This exhibit is a plan of the Gatun Locks area, upon which are marked the gate for entry to the area, the location where locomotives travel, and the location of the assignment board.

Q Now, would you tell the Court at which entrance of the canal the Gatun Locks are located?

A The Gatun Locks are on the Atlantic end of the Panama Canal.

Q Now, with respect to the red writing on this document, could you tell the Court who made the red writing?

A I made those notations myself.

Q Now, with respect to the arrow where you have "Main gate, operators enter here," would you tell the Court what that is?

A The main gate is the gate through which all personnel who work at Gatun Locks must enter and leave the area.

Q Is there any other entrance to the lock area?

A There are other entrances but they are not used for people to enter and leave at the end of shifts.

Q Now, where you have marked "Assignment board," would you tell the Court what that is?

A It is a board mounted on the wall of a building near the gate on which are the operators' names and on which is indicated the lane to which they are to be assigned, whether it

is east or west, and the locomotive number to which they are assigned.

Q Now, when a towing locomotive operator enters through that gate, must he go by that assignment board?

MR. GRUBER: I object, Your Honor. I think the exhibit speaks for itself as to whether a man would physically have to go by the board.

THE COURT: Well, I will permit him to answer.

Go ahead.

THE WITNESS: Normally, the operator would go by the board on the way to his duty assignment. The only exception to this would be if his assignment were on the east lock wall, in which case -- No. There is no exception, I am sorry. He would pass that board on the way to any lock wall.

BY MR. DONLAN:

Q What, if anything, is he required to do at this assignment board?

A He looks at the board in order to determine his duty assignment. Most of the men check off with a piece of chalk their name as they pass by.

Q Now, going over to the area to the left of the assignment board where you have written, "Locos. may be on any of the three lock walls", would you explain what you mean by that?

A The locomotives travel on both sides of each lock

chamber. There are two lanes. The locomotives may be anywhere on that wall, the full length of the wall.

Q When you say that, what do you mean?

A The locomotives travel with a ship passing through the locks. When the operator sees his assignment, he knows the position of his locomotive, whether it is the first, the second or a spare machine; and he looks at the lockage and locates the locomotive that he is assigned to.

Q Is there any requirement that the locomotive be in any particular spot when the shift changes?

A No, the locomotive may be anywhere along the lock wall, along the length of the wall.

Q One other question: Could you tell the Court the approximate distance between the main gate and the assignment board that you have marked here?

A The distance is about 75 feet.

MR. DONLAN: Your Honor, I offer Defendant's Exhibit No. 1 for identification in evidence.

MR. GRUBER: No objection, Your Honor.

THE COURT: Without objection, it will be received.

(Defendant's Exhibit No. 1 for identification was received into evidence.)

BY MR. DONLAN:

Q Mr. Hoenke, I will show you what has been marked as

Defendant's Exhibit No. 2 for identification, and I ask you if you can tell the Court what that is?

A (Perusing exhibit.) This exhibit is a plan of the Pedro Miguel Locks area, upon which are marked in red the main gate through which employees enter and leave the area, the location of the assignment board, and the three lock walls along which the locomotives run.

Q All right. Did you make the red notations on this drawing?

A Yes.

Q Now, with respect to the lockage assignment board, where is that located with relation to the main gate?

A The board is located just inside the main gate, within, I would say, 25 feet of the main gate on a small building wall.

Q Now, with respect to the location of the locomotives, may they be any place along the walls?

A Yes.

Q Now, where is the Pedro Miguel Locks with respect to the Gatun Locks? Where is it located on the canal?

A The Pedro Miguel Locks is on the Pacific side of the isthmus, whereas Gatun is on the Atlantic side.

MR. DONLAN: Your Honor, I offer Defendant's Exhibit No. 2 for identification in evidence.

MR. GRUBER: No objection, Your Honor.

THE COURT: Without objection, it will be received.

(Defendant's Exhibit No. 2 for identification was received into evidence.)

BY MR. DONLAN:

Q Mr. Hoenke, I show you what has been marked Defendant's Exhibit 3 for identification, and I ask you if you can tell us what that document is?

A (Perusing exhibit.) This document is a plan of the Miraflores Locks area, upon which have been noted in red the main entrance gate through which employees enter and leave, the assignment board, and the lock walls around which the locomotives move.

Q And who made the red notations on there?

A I did.

Q Now, where are the Miraflores Locks with respect to the Pedro Miguel and Gatun Locks?

A The Miraflores Locks are also on the Pacific end of the canal. They are the first of two sets. They are the first set that a ship enters when it leaves the Pacific. The Pedro Miguel Locks are a mile further inland and are the second set traversed by a ship.

Q Now, with respect to the location of the locomotives, where may they be when the shift changes?

A They may be at any location along the full length of

the lock walls.

Q To the same extent as they were with the other locks?
A Yes.

MR. DONLAN: Your Honor, I offer Defendant's Exhibit No. 3 for identification in evidence.

MR. GRUBER: No objection, Your Honor.

THE COURT: Without objection, it will be received.

(Defendant's Exhibit No. 3 for identification was received into evidence.)

MR. DONLAN: May I have these marked as Defendant's Exhibits 4 and 5, please?

THE DEPUTY CLERK: Defendant's Exhibits Nos. 4 and 5 marked for identification.

(Documents were marked Defendant's Exhibits No. 4 and 5 were marked for identification.)

(Exhibits shown to opposing counsel.)

BY MR. DONLAN:

Q Now, Mr. Hoenke, I will show you what has been marked as Defendant's Exhibit 4 for identification, and I ask if you can tell the Court what that is?

A (Perusing document.) Exhibit 4 is a document which furnishes data for a quarterly report of the Locks Division. The principal data furnished are the percentage of time during

which locks crews are actively engaged in lockage operations, that is, either handling a ship or traveling back to receive another ship.

Q. And where did the information contained in that document come from?

A. The utilization factors were computed from actual statistical data recorded in the daily lockage log, which is a record maintained daily by the Locks Division. This record contains time data for the passage of every vessel through the locks.

MR. DONLAN: Your Honor, I offer Defendant's Exhibit 4 for identification in evidence.

MR. GRUBER: Your Honor, I hate to delay matters but I don't believe I have a copy of that. I did have an opportunity to briefly look at it on a prior occasion.

(Exhibit was shown to opposing counsel.)

MR. GRUBER: Your Honor, I don't object to the authenticity of this document nor in fact, I suppose, on any other ground but its relevancy. I object on the grounds that the material contained in this document is not relevant to the issue in this case regarding the payment of overtime.

MR. DONLAN: Your Honor, the document is being introduced for the purpose of showing the actual crew utilization time, namely, how much time these employees are actually engaged in work for the Government. This is in support of the

contention that we have made that they were permitted to leave up to 20 minutes before the end of their shift. And we intend to show that the ships coming through the locks do not come through at a steady rate and if at the end of the shift, there is a 30-minute wait, they say, "There is not going to be a ship coming through for 30 minutes," then these people are allowed to leave.

Now, this procedure is set forth in Exhibits 1 and 2 which the plaintiff has offered in evidence; and this is our support to show that this really did happen, and to give some estimation to the Court as to how often it did happen. This will be the substance of the defendant's testimony.

THE COURT: I will receive it. You have your exception.

(Defendant's Exhibit No. 4 for identification was received into evidence.)

BY MR. DONLAN:

Q Now, Mr. Hoenke, I show you what has been marked for identification as Defendant's Exhibit 5, and ask you if you can tell the Court what that is?

A Exhibit 5 is a copy of a memorandum to locks employees stating that their duty stations of all locks employees -- No, I am sorry.

Q Just see if you can describe what it is without

reading it.

A It is a statement of duty station of locks employees.

Q All right. And who is it signed by?

A The Chief of Locks Division.

Q Who is that?

A Mr. Stockham.

Q Was he Chief of the Locks Division at or about the time the memorandum is dated?

A Yes.

MR. DONLAN: I offer Defendant's Exhibit 5 for identification in evidence.

MR. GRUBER: No objection.

THE COURT: Without objection, it will be received.

(Defendant's Exhibit 5 for identification was received into evidence.)

BY MR. DONLAN:

Q With respect to the crew utilization figures which are contained in Defendant's Exhibit 4, was that the only period that studies were made of crew utilization?

A No. This covers one quarter. Actually, we gathered similar data for periods of time before and after this period.

Q Can you recall any representative figures of crew utilization similar to those contained in Defendant's Exhibit 4?

A I have notes as to the others, if I may look at them.

Q Did you examine your records to find any additional

crew utilization figures?

A. Yes.

Q. All right. You may refer to whatever notes you have.

MR. GRUBER: Your Honor, I am going to object to this testimony. I think the best evidence in this case would be the documents themselves. It seems that the witness is relying totally on information he gleaned from those documents rather than from his own recollection.

MR. DONLAN: Well, Your Honor, he has studied the records. He is Chief of the Division and has studied the records and he has made notations from them.

THE COURT: I will permit it.

BY MR. DONLAN:

Q. Would you indicate what you found when you studied the records, Mr. Hoenke?

A. We had begun this record for Gatun in April 1968 and carried it through the end of December 1969 on a quarterly basis.

The range of percentage of operating time that a crew was actually engaged in operation is from a minimum of 88.1 per cent to a maximum of 93.2 per cent.

Q. In what quarter was the 93.2 per cent?

A. That was the first quarter of 1970, which is the quarter covered by Exhibit 4. This was the highest quarter of record.

Q Is it correct that your testimony as to the 93.2 per cent contained in Defendant's Exhibit 4 is the highest crew utilization figure you were able to discover?

A Yes. We made similar studies of crew utilization at Pedro Miguel and Miraflores starting in January of 1969.

Q And what did they reveal?

A We carried them through December 1969. At Miraflores, the range of crew use was from 68 per cent to 72.5 per cent; and at Pedro Miguel, the range was from 54.5 per cent to 76 per cent. The 76 per cent figure is nontypical because it covered a period when only one lane was in service due to overhaul.

The typical figures are from 54.5 to 59.1 per cent.

Q Now, when you talk of crew utilization in terms of per cent, just what does that mean?

A This is the per cent of the total scheduled time of an operating crew in which this crew is actually engaged in operation of locomotives.

Q Now, when a towing locomotive operator is not actively engaged in a lockage, what is he required to do if anything?

A If the idle period is less than about two hours, he is not required to perform duties except in isolated cases where he may be asked to transfer a locomotive for maintenance purposes.

Q Well, from your experience, what do the men actually

do during these periods?

A The majority of the idle time is not used in productive work.

Q What do the men do, Mr. Hoenke?

A They are permitted to leave their locomotive. They must stay where they can return to their locomotive in a relatively short time. We have some shelters built on the lock walls where they can wait. If the break is long enough, they may park their locomotives and go to a mess hall which is provided with benches, lockers and tables.

Q And if a new lockage is to begin, how are they notified of that fact?

A If the next lockage follows an extended break where they may have actually left their locomotives and gone some distance, a whistle is sounded which calls them. If the break was a short one of perhaps, oh, up to a half or three-quarters of an hour, they may be called through the radio in their locomotive. If the break is short, they stay within hearing distance of their locomotive radio. Each locomotive has a receiving set through which operators receive orders.

Q What occurs if one of these long breaks happens at the end of the shift?

A During a long break, the locomotives are parked in a central location rather than at the end of the wall and the in-coming operator who is assigned to a particular locomotive,

makes himself known to the operator previously assigned and the man who is relieved can then leave the area up to 20 minutes in advance of his scheduled shift end.

Q When you say "leave the area," what do you mean by that?

A He leaves through the main gate.

Q To go home?

A Yes.

Q What occurs if a shift changes during a lockage?

A The in-coming operator goes to his locomotive and if the locomotive is moving slowly, such as it will when towing a ship, he steps aboard the moving machine and announces to the operator that he is relieving him, at which time he takes over the controls and the relieved operator steps off.

If the locomotive is moving at a higher rate of speed returning light for another ship, it will slow down or stop to pick him up and he will take over the controls and the relieved operator may then leave the locomotive.

Q In your experience, Mr. Hoenke, approximately what percentage of the time at the end of a shift is the locomotive at the extreme end of a wall?

A Well, I could not give an accurate figure, but I feel that it is --

MR. GRUBER: I object to any conjecture on the part of the witness, Your Honor, if he can't give an accurate

figure.

THE COURT: Well, I was going to ask you later on to give me some evidence as to what situations do you apply 8 minutes, what situations do you apply 15 minutes. How do you calculate this?

MR. GRUBER: Are you addressing me, Your Honor?

THE COURT: Yes.

MR. GRUBER: My feeling, Your Honor, is that it should be a straight 15 minutes per day because the plaintiffs do not know from day to day where the locomotive will be located. They know that it may be located as much as 15 minutes away, so they are required to get there at least 15 minutes early.

THE COURT: On your own papers, you say sometimes it is only eight. Are you going to give them the extra 7 minutes, just throw it in?

MR. GRUBER: No, not just throw it in, Your Honor. It may in fact be only 8 minutes that they are required to walk, but they don't know that before they get there so they have to get there at least 15 minutes early.

THE COURT: Well, how far they have to go becomes relevant. I will let him answer the question.

Can you answer the question, Mr. Hoenke?

BY MR. DONLAN:

Q. Would you like to have it repeated?

A Yes, please.

Q I would like to know your best estimate of what percentage of the time, in your experience, is the locomotive at the extreme end of the wall at the end of a shift?

A I would estimate that it would be at the extreme end of the wall less than 50 per cent of the time.

Q Now, with respect to this practice of having the duty station of the towing locomotive operators at their locomotive, do you know how long that practice has been in effect?

A I know from personal experience that this practice pertained in August 1948 when I started to work in the Locks Division and in discussion on this matter with labor people and other management people, I believe it was the practice from the beginning of the locks operations.

Q Now, Mr. Hoenke, I will show you Plaintiffs' Exhibit No. 2 and direct you to the first line of that exhibit which starts, "All employees" and ask you if you would read that to yourself. Then, I will ask you a question.

A (Witness complied.)

Q Have you read that to yourself?

A Yes.

Q All right. Now, would you read that line to the Court?

A This statement reads, "All employees at Atlantic

Branch check in and out at the main gate for time-keeping purposes."

Q Now, is that a correct statement?

A No, it must be qualified. They checked in and out at the main gate at the time this statement was made for the purpose of determining whether they were in or out of the area. Time keeping was not based upon a recorded time when they passed through the gate.

Q Now, do you know who the author of that statement was contained in Plaintiffs' Exhibit 2?

A This was written by Mr. Danielsen, who was the Superintendent of the Atlantic Branch of the Locks Division.

Q Does he work for you?

A Yes.

Q Now, what was the purpose of having a timekeeper at the gate?

A The function he served was to record the persons who entered and left the area. It made it easy for the supervisor to determine whether or not some individual was on hand.

Q Was pay ever determined by his records?

A No.

MR. DONLAN: That is all I have, Your Honor.

CROSS-EXAMINATION

BY MR. GRUBER:

Q Mr. Hoenke, again referring to Plaintiffs' Exhibit 2

which I believe you have in front of you, it is your testimony that the first two lines that you have just read are not accurate?

A Yes, sir.

Q That that was a mistake by the superintendent of the Atlantic Branch?

A It is a mistake in the interpretation of the word "time-keeping."

Q You disagree with his interpretation?

A Yes.

Q Was this document made available to the employees in the Locks Division?

A This was not for general distribution.

Q Was it in fact available to locomotive operators?

A No, it was not.

Q Was any document ever issued countering this statement that appears in Plaintiffs' Exhibit 2 which you have just read, in other words, clarifying this statement?

A No, not to my knowledge.

Q I don't recall. Were you Chief of the Locks Division at the time this document was issued?

A Yes.

Q And you did not take any steps to issue a document correcting that statement, is that correct?

A That is correct.

Q Defendant's Exhibit 4 talks about crew utilization figures. Now, would you define what you mean by a crew?

A A lockage crew is a group of people who handle operations in one lane of a locks. It consists of a group of towing locomotive operators, their lockmaster, helpers, a gang to tie up and receive a ship, and a control house operator.

Q So, in other words, there are several different job classifications besides locomotive operator which were included in the figures in this document?

A The figures in this document were aimed at utilization of the crew and were computed based upon the actual recorded time when locomotives had returned to the end of the locks to receive a ship. The time between their arrival at the end of the locks and the time when the next ship arrived was considered as waiting time for that ship, during which the locomotive operators were not actively engaged in handling lockage activities.

Q But this document doesn't tell us how long a lay-up or how much -- Strike that. It does not tell us how much waiting time a locomotive operator would have in any particular situation before the next ship arrived?

A This is an average, and it was based upon all lockages during that three-month period. A lockage is a passage of one ship or a pair of ships handled together.

Q Well, this particular document covers what quarter,

Mr. Hoenke?

A It covers a quarter, a three-month period for the first quarter of fiscal year 1970. This is for July, August and September 1969.

Q And the figure of 93.2 next to Gatun for the first quarter October means what?

A That is the figure for the three months.

Q Does that mean that the locomotives were in actual operation 93.2 per cent of the time during that quarter?

A It means that the crews -- the locomotive operating portion of the crews were actually actively engaged in operations.

The reason I qualify it like that is that other persons in the crews, such as, a control house operator, is ready as soon as he lets one ship out; whereas the locomotive operators must return to the end of the locks to receive the next ship. So, it turns out that their activities span the greatest percentage of time, more so than the other employees engaged in the locks.

Q So that the time spent by a locomotive operator at the end of the wall waiting for the next ship would not be included in the percentages that are here?

A Right.

Q But it may be that a locomotive operator could wait five minutes for the next ship or, perhaps, an hour; is that what you are saying?

A. That's right.

Q. Now, isn't it unusual for a locomotive operator to have to wait more than 30 minutes for the next ship to come in?

A. No.

Q. You say that's a usual occurrence?

A. I say it is not unusual.

Q. Well, is it usual?

A. No.

Q. What, in your experience, would you say is the normal waiting period that a locomotive operator might have to wait once he got to the end of the wall before the next ship came in?

MR. DONLAN: Your Honor, I would object to this unless we relate this to one particular lock. There are different crew utilization factors for each lock and there are different time periods involved, waiting periods, at the different locks. Mr. Hoenke can explain that if given an opportunity.

THE COURT: Take them lock by lock.

MR. GRUBER: Certainly.

BY MR. GRUBER:

Q. First take the Atlantic side, the Gatun Locks.

A. At Gatun Locks, the percentage of used time is the highest of all three locks because it takes longer to transit ships through the three steps. There is no normal waiting time.

It's an erratic figure. Operators of one crew may receive several ships immediately upon their return with no break; and, on the other hand, they may get a break of 5, 10, 15 minutes or occasionally a half hour.

Q What about Pedro Miguel Locks, which I think is next?

A Pedro Miguel Locks has only one step and transit of a ship through Pedro Miguel is accomplished much more rapidly. The percentage of used time there is around 55 or 56 per cent. The frequency of waits or stand-by time is much higher and the length is much higher. They, too, may receive a ship immediately upon return from a lockage but it is common for them to have stand-by time of 15 minutes to an hour. They will frequently have two or three hours.

Q What period of time would have to elapse before they would be allowed to leave the immediate vicinity of the locomotive? In other words, how great a break would it be for them to be able to leave their locomotive area?

A In a break of a half hour or less, they are free to step out of their locomotive and sit down nearby any time even with a brief break. They watch the in-coming ship and get aboard in order to get underway in time.

Q They are subject to the call of duty at all times, are they not?

A Yes. Now, if a break is longer, say, an hour or an

hour and a half or two hours, they will drive their locomotives back to a central location and leave the locomotive, sit on a bench under a control house or go to the mess hall, in which case they are called to come out with the whistle.

Q It is your testimony that this is not an infrequent occurrence at the Pedro Miguel Locks?

A It is a frequent occurrence.

Q A frequent occurrence.

A Pedro Miguel Locks is manned in a very -- well, much more than the necessary operating time available in order to handle ships upon arrival and, thereby, keep the other locks busy.

Q Well, even when one of these long breaks occur, the locomotive operators are not free to leave the locks area itself, are they?

A No. They remain inside the locks area.

Q And, of course, at all times are subject to being called to duty, is that right?

A Yes.

Q Or given any other assignment, is that correct?

A Yes.

Q Now, what about the Miraflores Locks?

A Miraflores has two steps. It takes an intermediate amount of time to handle a ship. The result is that they have about 45 per cent of the locomotive crew time idle, standing by

or where they can return to a central point and leave their machine for a while.

Again, at Pedro Miguel and Miraflores, the operators may handle several lockages consecutively with very little or no break, then they may get breaks of considerable length. The frequency and the length of these breaks are much higher at Miraflores and Pedro Miguel than at Gatun.

Q But it is possible, though, for these locomotive operators to have to work almost continuously from the start of their shift to the end of their shift without a break, isn't that true?

A Yes, this can happen.

Q Now, since you have been employed in the various capacities by the Panama Canal Company, has it come to your attention that there have been complaints or protests with regard to the defendant's failure to pay overtime for the period which is in dispute in this case?

A Yes, it has been brought up before.

Q When is the earliest that you can recall it being brought up?

A The earliest incident where it was brought up formally that I am familiar with was a request by the Operating Engineers Union. I believe you have the document. I don't recall the exact date.

Q That was sometime, I believe, in the early '50s, is

that accurate, or in the mid-'50s?

A No, it was later than that. It was either late '50s or early '60s.

Q And there have been other protests by other unions since that time in your experience?

A The only other protest by a union group was the one that the NMU initiated.

Q The National Maritime Union?

A Yes.

Q And in both instances, the Operating Engineers and the National Maritime Union, formal grievance procedures were followed, is that correct?

A Formal procedures were followed; however, I don't think they were handled technically in accordance with Federal Government grievance procedures. However, they were brought up formally and discussed with officials of the Panama Canal Company.

Q And in each instance, a final determination was made by the Panama Canal Company not to pay overtime for this period; is that correct?

A Yes.

Q Now, are there any rules or regulations which govern locomotive operators or any employees while they are engaged in the performance of their duties, safety rules, for instance?

A There are many rules.

Q Besides safety rules, or do they all relate to safety?

A Well, all employees have elaborate manuals of safety rules. In addition, the locomotive operators have a pamphlet covering operation of towing locomotives.

Q Are there any rules with regard to destruction of property in the locks area?

A I don't think the Locks has any specific rules in this respect. It is understood by everyone that the destruction of property is an offense where appropriate action is taken.

Q Now, I assume that disciplinary measures or other appropriate action is taken in the event that safety rules or other rules of the Company are violated by employees, is that correct?

A Yes, appropriate action is taken.

Q And towing locomotive operators would be subject to all of these rules from the time they enter the gate at the locks areas, isn't that correct?

A Yes.

Q In other words, these rules would affect them before they got to their locomotive?

A That is right.

Q Now, are you familiar with a procedure called "called-in as soon as possible" for locomotive operators?

A Yes.

Q Would you explain that to the Court, please?

A Occasionally, there is need for an additional employee, either an operator or a maintenance man. It may be due to a breakdown, illness or absenteeism. In such a case, the supervisor is authorized to call in an individual employee to come as soon as he can.

Q In other words, this might be an emergency situation where you would need a towing locomotive operator as soon as possible?

A Yes.

Q Now, in those situations, when does the compensation for the locomotive operator start?

A Compensation starts as soon as he is in the area.

Q As soon as he enters the gate, isn't that correct?

A Yes.

Q So, in other words, on those occasions you do consider it work time from the time he enters the gate until the time he gets to his locomotive?

A He is compensated for that time, yes.

MR. GRUBER: I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. DONLAN:

Q Mr. Hoenke, do you know why it is different when a person is called-in in an emergency situation by beginning his pay at the gate rather than at his locomotive?

A Yes. The reason why we consider it compensable is that the need may vary a great deal. He may be called to fill a spot in the crew for which the exact time is not clear. He may enter the area and be in a stand-by situation for a period of time. It is difficult to distinguish in advance just what the specific time should be. Because of the likelihood of it being a stand-by situation, we have considered it compensable.

Q In your experience, is it more often a stand-by situation when they are called in on an emergency?

A It's usually a brief period of stand-by involved because his getting his assignment is not routine from a board. When he comes into the area, the supervisor must determine where he can best be utilized. Usually in a case like this, someone is working overtime from another crew and the supervisor has to determine where to assign the individual, and this would depend considerably upon when the individual arrives. It is not as simple as just looking at the board and proceeding to an established relief locomotive.

Q Mr. Hoenke, you were asked on cross-examination whether the rules of the Panama Canal Company would apply to an employee who had checked in the gate but had not yet gotten to his locomotive. Do you recall that?

A Yes.

Q Now, I would ask you if the rules of the Panama Canal Company would apply to an employee who came into the locks

area on his day off?

A They would. We enforce the safety rules with respect to tourists, anyone that is in the area. They are required to abide by the rules pertaining to safety in the area.

Q Now, I will show you Plaintiffs' Exhibits 3 through 8, and ask you if you can recall any protests by the towing locomotive operators prior to the protests which are contained in Plaintiffs' Exhibits 3 through 8, inclusively, that is, protests concerning the conditions of their employment?

A Yes, there was one other protest that was handled formally by a group of operating engineers.

Q Is that the same as towing locomotive operators?

A Some of the towing locomotive operators are members of the Operating Engineers Local.

Q Was that a protest concerning the conditions of their employment that you are talking about?

A Yes.

Q Do you recall when that was?

A I do not recall the exact date; however, it did precede this one and I think it was in the early '60s.

MR. DONLAN: Thank you. I have no further questions, Your Honor.

RECROSS-EXAMINATION

BY MR. GRUBER:

Q Mr. Hoenke, getting back to this "called-in as soon as possible" situation, I believe you indicated that one of the reasons that the defendant considered this period as compensable time was because it was primarily for the benefit of the Panama Canal Company in an emergency-type situation; is that correct?

A I didn't say it was primarily for the benefit of the Company; I said that the principal reason was that his assignment when he did arrive was not clear in advance and that frequently after arrival, he would be in a stand-by situation.

Q . And he would be compensated for ~~the~~ time when he was just standing there in effect doing nothing, is that right?

A That is right.

Q Now, wouldn't you agree that the act of checking the assignment board and physically checking a mark next to one's name is an act which is primarily for the benefit of the Company?

A It is certainly for the benefit of the Company that he do this.

MR. GRUBER: Your Honor, I must admit that in my cross-examination, there was one area that I didn't cover. It might not be considered technically proper recross, but I ask Your Honor's indulgence.

THE COURT: Go ahead.

MR. GRUBER: Thank you, Your Honor.

BY MR. GRUBER:

Q Prior to January 1, 1968, Mr. Hoenke, was there any requirement that an individual check in with the timekeeper at the gate, that is, locomotive operators check in with an individual timekeeper at the gate?

A Yes. We had a clerk at the gate and he had a check-off list of identifying numbers, one for each employee; and as an employee came through the gate, he had been asked to call out his identifying number and the clerk would check it off. When the man left the area, he would check it off in a similar manner.

Q Was this practice discontinued on or about January 1, 1968?

A Yes.

Q Can you tell us why it was discontinued?

A In January, the Panama Canal Company switched to a computerized time-keeping system and great emphasis was put upon cutting down on the force that was doing work relating to time keeping.

Since these people spent most of their time in an office remote from the gate, posting time, it was not considered necessary to keep them solely to exercise this check-off system at the gate.

Q Mr. Hoenke, I ask you did the changing of this

system on or about January 1, 1968 come about or was it influenced in any way by the claims for overtime which were pending at that time?

A. No, it was not. Prior to the change, this check-off system was utilized as an indication of presence in the area, not as a basis for detailed time keeping.

Q. But the individuals were required to indicate their name and number to the timekeeper, is that correct?

A. They would call out their number.

MR. GRUBER: No further questions, Your Honor.

MR. DONLAN: I have no other questions, Your Honor.

THE COURT: Mr. Hoenke, I just want to ask one question to clarify something for myself.

When you were referring to Plaintiffs' Exhibit 2, you indicated there was some error as to the effect of the first sentence and indicated, further, that the time they passed through the gate is not the starting point of work, right?

THE WITNESS: Yes.

THE COURT: When do they begin to work? How do you set up the time schedule? When does their eight hours begin?

THE WITNESS: Our shifts are established formally, 8 to 4, 4 to 12 and 12 to 8. If a man is scheduled to work one of these shifts, he is timed for the period embraced by this period. His supervisor would notify our timekeeping office if he were not on duty during this period or during his eight-hour

shift.

We have this informal arrangement whereby we permit them leaving a little in advance and we permit a man leaving upon being relieved a little in advance of his shift end. However, we do time them for the full eight hours that they are scheduled.

THE COURT: So, their time is supervised by the supervisor in charge of that group?

THE WITNESS: Yes. Each of these people turns in himself a labor distribution slip at the end of his shift in which he notes his name and the total hours worked. This is picked up by the supervisor and if he was tardy in reporting to his duty station, it is at this point that it is noted or recorded, and these slips are turned in to our timekeeping group and they do not time anyone as late unless the supervisor so indicates on that card.

THE COURT: Thank you.

Anything further, gentlemen?

MR. GRUBER: In connection with your questions, Your Honor, I have a few questions if I may.

FURTHER RECROSS-EXAMINATION

BY MR. GRUBER:

Q To make the record clear, Mr. Hoenke, the start of the eight-hour shift for locomotive operators is the moment they arrive at their locomotive, is that correct?

A The duty station is the locomotive. We prescribe their schedule and post it in advance. If he arrives at the locomotive in advance of his scheduled work shift, this is done at his discretion. We do not require that he report at the locomotive in advance of his scheduled shift.

Q But you do require that he be there at the start of his scheduled shift?

A Yes.

Q And if an individual is relieved earlier, as you have indicated, that is solely a voluntary arrangement between the locomotive operators?

A Yes.

Q And no one is required to relieve another individual earlier, is that correct?

A That is right.

MR. GRUBER: Thank you. That is all I have.

MR. DONLAN: Nothing else, Your Honor.

THE COURT: Thank you, Mr. Hoenke.

(The witness left the stand.)

* * * * *

C E R T I F I C A T E

The foregoing is certified to be the official transcript of the testimony of Thurman H. Hoenke heard on March 2, 1970 in Civil Action 1890-68.

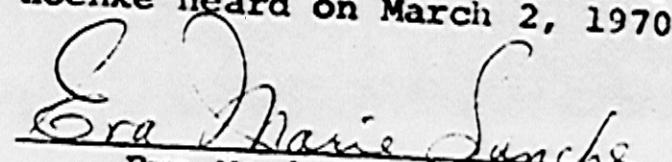

Eva Marie Sanche
Official Court Reporter

EXHIBIT P-1 - MEMORANDUM FROM T. J. EBDON

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

UNITED STATES GOVERNMENT

Memorandum

TO : Chief, Locks Division DATE: Dec 21 1966

DATE: Dec. 21, 1966

FROM : Superintendent, Pacific Branch

SUBJECT: Check-in Procedure, Lockage Assignments, and Overtime Policy at the Pacific Locks.

1. All Pacific Branch personnel check-in and check-out at the Main Gate. These times do not necessarily constitute timing for time-keeping but do show that the employee is in the Locks Area during certain hours.

2. Lockage assignments are made as follows:

a. At Miraflores Locks assignments for lockages are made at boards under the Control House. This applies for Locomotive Operators, Line Gangs, Helpers, and Lockmasters.

b. At Pedro Miguel Locks assignments for lockages are made at a board at Main Gate for Towing Locomotive Operators, Helpers, and Lock-masters who are relieving members of another crew. Employees of the aforementioned categories who are not relieving obtain their assignment from a board under the Control House. The Line Gangs know from established procedure that certain crews relieve at a specific location. On rare occasions when the line gang assignment is questionable the members obtain their assignment by making a telephone call to Line Gang Foreman.

3. Overtime policy for Pacific Branch is as follows:

Exhibit P-1 - Memorandum from T. J. Ebdon

a. At the beginning of a shift employees relieve at their duty station. The duty station for Locomotive Operators and Helpers is at an assigned locomotive. The duty station for the Line Gangs is generally at the end of an approach or wing wall. If a Locomotive Operator is not relieving his duty station is under the Control House. With the present crew arrangements (5 crews at both Locks) the No.'s 1, 3, 4 and 5 crews relieve. The No. 2 crew does not relieve.

b. When personnel are relieved at their duty station before the end of the shift they are not paid overtime.

c. When personnel are "called-in" their timing begins at the time specified and they are paid a minimum of two hours.

d. When personnel are called in on a "as soon as possible" basis they are timed in when they enter the Locks area.

e. When personnel work overtime they are timed out when they leave the Main Gate. However, this time is not to exceed a time considered by Lockmaster to be reasonable. This procedure is outlined in Locks Division Memorandum No. 61-7 dated October 4, 1961.

f. When an employee is placed in a duty status prior to the beginning of his shift timing begins at a time specified by the Lockmaster. The normal practise is to start the employee to work at a time that is considered reasonable for employee to reach assigned locomotive or work station without delaying the lockage.

g. Personnel on lockage when relieved may leave the Locks area 20 minutes before the end of a shift. This includes the Control House Operators.

Exhibit P-1 - Memorandum from T. J. Ebdon

4. Typical walking times at the Pacific Branch are as follows:

Miraflores Locks

a. From Main Gate to Control House 1 to 2 minutes.

b. From Control House to locomotives "on the spot" - less than a minute.

c. From Control House to end of approach wall - 10 to 15 minutes.

Pedro Miguel Locks

a. From Main Gate to end of approach walls - 10 to 15 minutes.

b. From Main Gate to Control House - Less than 5 minutes.

c. From Control House to end of north approach wall - 10 to 15 minutes.

5. Employees assigned to maintenance work who are not relieving another employee are expected to be at their respective shops at the start of the shift. They are allowed to clean-up shortly before the end of shift and they time-out at the end of their 8-hour shift. Maintenance people assigned to maintenance on a relieving basis follow the same general custom as operations; that is, if relieved they may leave the Area 20 minutes before the end of their shift. However, the job is covered on a 24-hour basis.

s/ T J Ebdon
T.J. Ebdon

CC:
File

EXHIBIT P-2 - MEMORANDUM FROM R. J. DANIELSEN

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

TO : Chief, Locks Division DATE: December 21, 1966
FROM : Superintendent, Atlantic Branch
SUBJECT: Check in and Out Procedures and Duty Stations

* * *

Lock Operator, Craft; Towing Locomotive Operators and
Helpers Assigned to Lockage:

Required: Operators and Helpers to check in at main gate early enough to check shift board and proceed to assigned locomotive and relieve the operator and helper on duty at beginning of shift. The crew for the first shift in that lane for the day are required to be at assigned locomotives, middle level, at beginning of shift.

To be at duty station on time, Operators and Helpers must check in at main gate approximately 15 minutes prior to start of shift. Personnel being relieved, depending on where and when they are relieved, would check out of the area up to 15 minutes after end of shift.

If the crew is in a "Standby Status" (No Lockages) at end of shift, they may check out of the area up to 20 minutes prior to end of shift.

Operators and Helpers may spend up to 8 1/2 hours in the area and be paid for 8 hours.

General Practice: Relieving Operators and Helpers check in the main gate 40-45 minutes prior to start of shift. They check shift board and proceed to relieve at assigned locomotives. The relieved Operators and Helpers proceed to the main gate and are allowed to check out up to 20 minutes prior to end of shift.

Exhibit P-2 - Memorandum from R. J. Danielsen

This practice also amounts to Operators and Helpers spending up to 8 1/2 hours in the area and be paid for 8 hours.

During the past year some Operators have started relieving on the hour (start of shift) as required. This has been a source of complaint by Operators who relieve 30 minutes early. Under these circumstances, an Operator may spend up to 9 hours in the area and be paid for only 8 hours. However, relieving early is a "Gentleman's Agreement" among the Operators.

* * *

EXHIBIT P-3 - LETTER DATED 11/18/66 FROM RENE LIOEANJIE
#1

National Headquarters Affiliated with the American Federation of Labor and Congress
of Industrial Organizations
36 SEVENTH AVENUE, NEW YORK, N. Y. 10011 . TELEPHONE: WATKINS 4-3900

C O P Y

November 18, 1966

Captain Mortimer J. Prince
Director, Marine Bureau
Panama Canal Company
(Through: Chief, Locks Division)

Dear Captain Prince:

We are herewith requesting a conference with you, Mr. Hoenke and any other Locks Division Personnel directly concerned to discuss an existing problem of vital concern to Locomotive Helpers, Locomotive Operators, Boatmen and Linehandlers employed at the various Lock Installations.

It is our understanding that "in order to ensure operation of the Canal on a 24-hour basis", an arbitrary "check-point" was instituted several years ago for personnel referred to above. In effect, this ruling makes it mandatory for said personnel to report to work approximately 20 to 30 minutes earlier each day in order to be at their "duty station" at the beginning of their work shift. Inasmuch as they have been officially required to check in at the gate at this time, we are of the opinion that they deserve compensation for the additional time involved in excess of their regularly scheduled 8 hours daily.

We hope that you will find it possible to honor this request at your earliest possible convenience.

Very truly yours,

Rene Lioeanje
Regional Director

RL/jfw

EXHIBIT P-4 - LETTER DATED 11/23/66 FROM M. J. PRINCE

PANAMA CANAL COMPANY
CANAL ZONE

Seal

IN REPLY REFER TO:

Balboa Heights, C. Z.
November 23, 1966

Mr. Rene Lioeanjie, Regional Director
National Maritime Union of America
Box 3352 Estafeta #1 de Caledonia
Panama, R. P.

Dear Mr. Lioeanjie:

Your letter of November 18, 1966 indicates that you may not have a full understanding of the procedures followed for about 50 years at the Locks.

The question of reporting to a duty station at a shift's starting time has already been discussed with and explained from time to time to representatives of Lock and Locomotive operators. Since your organization was not concerned with the matter at those times I believe it would be more expedient if you would meet with Mr. T. H. Hoenke, Chief, Locks Division on this matter. He will meet with you in his office on Wednesday, November 30, at 0900.

Please let him know in advance if you will have anyone else accompanying you to the above meeting, or if the above time and date are unsatisfactory to you.

Very truly yours,

s/ M. J. Prince
M. J. Prince

EXHIBIT P-5 - LETTER DATED 12/8/66 FROM M. J. PRINCE

PANAMA CANAL COMPANY
CANAL ZONE

Seal

IN REPLY REFER TO:
MR

Balboa Heights, C. Z.
December 8, 1966

Mr. Rene Ch. Lioeanjie
Regional Director
NMU, Panama Canal Division
Box 3352 Estafeta #1 de Caledonia
Panama, Republic of Panama

Dear Mr. Lioeanjie:

I consider that it was both pleasant and productive to discuss locks personnel labor problems involving duty station with yourself and Mr. Gaskin this morning. Upon the conclusion of this consultation, I stated that I would give you a reply in two weeks' time.

Upon further consideration, I find that before replying I must consult with Company officers who are on leave during the holiday period. In the interest of providing a more worthwhile response to your petition, I find that I will need until January 13, 1967. I trust that this date will be satisfactory to you.

Sincerely,

s/ M. J. Prince
M. J. Prince
Marine Director

EXHIBIT P-6 - LETTER DATED 1/13/67 FROM M. J. PRINCE

PANAMA CANAL COMPANY
CANAL ZONE

Seal

IN REPLY REFER TO:

Balboa Heights, C. Z.
January 13, 1967

Mr. Rene Ch. Lioeanjie
Regional Director
NMU, Panama Canal Division
Box 3352 Estafeta #1 de Caledonia
Panama, Republic of Panama

Dear Mr. Lioeanjie:

I have considered the matter of requiring Locks Division employees to be at their work station at the start of their shift, as discussed in the meeting held with you on December 8, 1966. My review with other Company officials concerned again bears out the conclusions reached in the past that Locks Division employees receive compensation for all time spent working at their duty station.

Accordingly, I regret that I must advise you that favorable consideration cannot be given to your petition.

Very truly yours,

s/ M. J. Prince
M. J. Prince
Marine Director

EXHIBIT P-7 - LETTER DATED 2/8/67 TO LT. GOV.
HAROLD R. PARFITT

#3

8 February, 1967

Lt. Gov. Harold R. Parfitt
Lieutenant Governor/Vice President
Panama Canal Company/ Canal Zone Government
Balboa Heights, Canal Zone

Dear Colonel Parfitt:

On 18 November, 1966 we approached Captain Prince, Director of the Marine Bureau on the failure of the Panama Canal to remunerate certain Locks Division employees for time spent on the job over and above the regular work shift. A copy of our letter of complaint is enclosed as well as a copy of Captain Prince's reply of 13 January, 1967.

I appeal to you to study the problem with a view to payment of monies due the affected employees since Captain Prince's reply in no way clears up the matter.

Captain Prince's ambiguous statement that "review with other Company officials concerned bears out the conclusions in the past that Locks Division employees receive compensation" can hardly be accepted by us in view of his inability to show in what way and at what times such compensation for "all time spent at duty stations" has been paid to affected Locks employees.

My organization expects speedy correction of this inequity and trust that you will give this appeal your personal and prompt attention.

Yours very truly,

Rene Lioeanjie
Regional Director

RL/jfw

EXHIBIT P-8 - LETTER DATED 2/21/67 FROM H. R. PARFITT

CANAL ZONE GOVERNMENT
BALBOA HEIGHTS, CANAL ZONE
OFFICE OF THE GOVERNOR

#4

Seal

IN REPLY REFER TO:

FEB 21 1967

Mr. Rene Lioeanjie, Regional Director
National Maritime Union of America
Apartado 3352
Panama 4, Republic of Panama

Dear Mr. Lioeanjie:

Reference is made to your letter of February 8, 1967 concerning the method used in timing employees of the Locks Division. Your letter refers to an earlier letter from your organization to the Marine Director dated November 18, 1966 on the same subject and his reply dated January 13, 1967.

The issue you have raised is really one of what constitutes the duty station for Locks Division employees. Your organization has obviously taken the position that Locks Division employees should be compensated commencing with the time they pass through the Locks gates on their way to their duty stations. The Marine Director's position is that employees should be compensated as at present, commencing with the time they actually reach the point within the Locks area where duties are performed.

This matter has been reviewed on several occasions in the past and each review has led to the conclusion that the existing timekeeping practices in the Locks Division are correct. I have again reviewed the Locks Division timekeeping practices and concur that they are appropriate.

Very truly yours,

s/ H. R. Parfitt
H. R. Parfitt
Acting Governor

In The
United States Court of Appeals

For the District of Columbia

No. 24464

WADE V. CARTER, JR., FRANK R. COSTANZO, ARTHUR
M. HILAND, ROBERT KNAPP, YANE LEVES, LEONARD
B. WILSON, and all others similarly situated,

Plaintiffs - Appellants,

- against -

PANAMA CANAL COMPANY,

Defendant - Appellee.

*On Appeal from the United States District Court for the
District of Columbia*

BRIEF FOR PLAINTIFFS-APPELLANTS

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 1 1970

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 24,464

WADE V. CARTER, JR., FRANK R. COSTANZO,
ARTHUR M. HILAND, ROBERT KNAPP, YANE
LEVES, LEONARD B. WILSON

And all others similarly situated

Appellant

versus

PANAMA CANAL COMPANY

Appellee

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

STATEMENT OF ISSUES

1. Are towing locomotive operators employed by the Panama Canal Company entitled to overtime pay pursuant to 5U.S.C.

- Section 5544 for the daily 15 minute period spent in checking an assignment board to learn the location and identity of their locomotives and then walking to said locomotives?
2. Are the provisions of the Portal to Portal Pay Act, 29 U.S.C. Sections 251-262 applicable to wage board employees of the Panama Canal Company, such as the appellants, so as to preclude the recovery of overtime pay in this case?
3. Is not the daily 15 minute period for which overtime is sought herein of sufficient duration to be outside the "de minimis" maxim relied upon by the court below?
- This case has not previously been before this Court under its present designation or under any other form, designation or title.

STATEMENT OF THE CASE

PROCEEDINGS BELOW

This is an appeal from a final order entered on May 20, 1970 by the United States District Court for the District of Columbia (Corcoran, J.) dismissing the complaint herein. Jurisdiction is based on 28 U.S.C. Section 1291.

Appellants are towing locomotive operators (hereinafter referred to as the "operators") employed by appellee Panama Canal Company (hereinafter referred to as the "company") and

brought this action on behalf of themselves and others similarly situated, a class action being intended, for overtime pay pursuant to 5 U.S.C. Section 5544.¹ The operators maintained that they, and others similarly situated, are entitled to overtime pay for the daily 15 minute period during which they are required by the company to check an assignment board in order to learn the location and identity of their locomotives and then walk to the locomotives. The operators sought relief in the nature of an order directing an accounting and the payment of all unpaid overtime monies for the activity in question from July 29, 1965 to date and ordering the company to continue said payments in the future.

The court below dismissed the complaint, after trial, holding that the case either fell under the Portal to Portal Pay Act, 29 U.S.C. Section 251 et. seq. or the "de minimis" rule enunciated by the Supreme Court in Anderson v. Mt. Clemens Pottery Co. 328 U.S. 680, 66 S. Ct. 1187 (1946) and that in either event the activity in question was not compensable.

1. The District Court's jurisdiction arises under 2 Canal Zone Code Sections 61(c) and 65 (a) (3).

STATEMENT OF FACTS

In order for a vessel to transit the Panama Canal, it must pass through three lockage areas - Pedro Miguel and Miraflores on the Pacific side and Gatun on the Atlantic side (2a). As a vessel enters each lock, it is secured by cables to towing locomotives which are located on the walls of the lock on either side of the vessel (19a, 43a). These locomotives then tow the vessel through the lock until it is once again in the Canal channel (19a, 43a).

The operators of the locomotives work eight (8) hour shifts and are required by official order of the company to be at their locomotive at the start of their shift (20a, 44a).

In order to reach their duty station by the start of each shift the plaintiffs must enter the lock area in the Canal Zone and then walk to their locomotives (3a, 20a, 45a-46a). They do not know, prior to reporting, the locomotive to which they are assigned or the location of said locomotive. In order to obtain this information, they must first check a lockage assignment board and then walk to their locomotives (3a, 21a, 45a). This procedure is officially required by the company as demonstrated

by memoranda issued by the Superintendents of the Atlantic and Pacific Branches (131a, 134a).² Since their locomotives may be located as much as fifteen (15) minutes away from the lockage assignment board, it is necessary for plaintiffs to check the assignment board at least fifteen (15) minutes before the start of their eight hour shift in order that they can be at their locomotives on time (4a, 24a, 99a). During the period of time prior to reaching the locomotives, plaintiffs are subject to disciplinary action for violations arising during that time (121a-122a).

For several years prior to this lawsuit and at least prior to July 29, 1965,³ locomotive operators employed by defendant or their representatives have attempted to persuade defendant that they are entitled to overtime pay for this daily 15 minute period (120a-121a, 136a-141a). However, defendant has refused to pay overtime compensation for this time (121a). Yet, defendant does pay locomotive operators from the time they enter the gate until they reach their locomotives when they are called in on "an as soon as possible" or emergency basis (123a).

2. The court below found that operators were not required to report to the assignment board prior to going to their duty stations (4a). We respectfully submit that this finding was against the weight of overwhelming evidence to the contrary (49a, 131a, 134a).

3. July 29, 1965 is the cutoff date for the instant claims under the appropriate 3 year statute of limitations 5 Canal Zone Code Sec. 42 (3) (a).

ARGUMENT

POINT ONE

Towing Locomotive Operators of the Panama Canal Company are Entitled to Overtime Pay Under 5 U.S.C. Section 5544 for the Daily 15 Minute Period Spent in Checking an Assignment Board to Learn the Location and Identity of Their Locomotives and Walking to Said Locomotives

5 U. S. C. Section 5544 sets out the legislative scheme for payment of overtime compensation to "wage board"⁴ employees of the federal government. It provides in pertinent part that:

"An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week . . . "

The applicability of this section to Panama Canal Company employees has not been contested by defendant,

4. The parties have stipulated that the operators are "wage board" employees.

and indeed, is not subject to doubt in view of the decisions of the Supreme Court in U.S. v. Townsley, 323 U.S. 557 (1945) and Hearne v. U.S., 331 U.S. 858 (1946) which, inter alia, held that the predecessor to 5 U.S.C. Section 5544 (5 U.S.C. Section 673c) was applicable to Canal Zone employees. Moreover the applicability of 5 U.S.C. Section 5544 to company employees was clearly spelled out by Congress in Section 17(3) of Pub. L. 85-550, 72 Stat. 411. Significantly 5 U.S.C. Section 5544 does not contain the requirement of 5 U.S.C. Section 5542, which deals with overtime pay for classified employees, that the overtime work be "officially ordered or approved" in order to be compensable.⁵

In any event, the company does not appear to dispute the contention of the operators that by necessity, they are required to check an assignment board in order to

5. Appellants submit that Judge Corcoran's finding that the operators are ^{not} required by the company to report to the assignment board was in error although the Judge appears to have agreed with our contention that 5 U.S.C. Section 5544 does not require official order or approval since his opinion does not go off on this point. The memoranda prepared by top company officials (131a, 134a) specifically provides for such reporting. Moreover, the correspondence exchanged between representatives of the operators and the highest level of company authority (136a-141a) demonstrates the company's awareness of this practice and its approval of same.

ascertain the identity and location of their locomotive and that the locomotive may be spotted as much as 15 minutes walk from the assignment board. As the district court found, the operators "must check the board at least 15 minutes before the start of his eight hour shift to arrive at his locomotive at time".

Accordingly, the only question that must be considered in determining the applicability of 5 U.S.C. Section 5544 is whether the activity in question is "work" within the meaning of the statute. We submit that prevailing authority in cases dealing with both company employees and other classes of federal personnel clearly demonstrates that the activity is indeed "work", keeping in mind that 5 U.S.C. Section 5544 should be construed liberally in favor of employees since "it was intended to improve the conditions of working men" Kelly v. U.S., 96 F.Supp 611, 615 (Ct. of Claims, 1951) aff'd. 342 U.S. 193.

The act of checking the assignment board is primarily for the benefit of the company since it enables its locomotive operators to locate their locomotives and thus facilitates the orderly process of transiting vessels through the Canal, without undue delay in the manning of this vital equipment.

No such convenience is conferred upon the operators however.

Surely it would be more convenient for these men to be able to remain at home for an additional 15 minutes and receive the information as to the identity and location of their locomotives through some other device. This is apparently not possible, however, and so it is necessary for the operators to report to the assignment board at least 15 minutes before the start of their shift.

In Abbott v. U. S., 151 F. Supp 929 (Ct. of Claims, 1957) Panama Canal Company pilots sought overtime pay from defendant pursuant to the predecessor to 5 U.S.C. Section 5544. The time in dispute consisted of travel time spent on defendant's vessels which took the pilots back to their starting point after they had piloted a ship through one or more lock areas. The Court held that since the company paid for this time when it was not overtime, it obviously considered the time to be worktime and accordingly ordered the payment of overtime under the statute. Similarly the defendant in this case pays locomotive operators from the time they enter the gate to the time they reach their locomotives when they are called in on an emergency basis. If this time is considered "work" on such occasions,

then, as in Abbott, it must also be considered "work" on a normal workday.

In Anderson v. Panama Canal Company, 194 F. Supp. 765 (D.C.Z. 1961), rev'd. on other grounds 312 F. 2d 98 (5 Cir. 1963) cert. den'd., 375 U.S. 832 (1963), workers employed in various capacities aboard Panama Canal Company dredges brought an action for overtime pay for time spent in Canal vessels being taken from the dock to the dredges out in the Canal channel. Their "duty station" in this instance was the dredge itself, and their pay did not commence until they reached the dredge. Although the defendant paid Pilots for similar time, as noted in Abbott v. U.S., supra, they refused to do so for the dredge employees, even though these employees were subject to being reprimanded and disciplined for misconduct during such travel time.

Once again the Court held that the disputed time was worktime and thus compensable as overtime noting:

"... I/t has all of its indicia, including physical or mental exertion, controlled or required by defendant, and pursued necessarily and primarily for the benefit of defendant. . ." (P. 778).

In support of its holding the Court cited Tennessee Coal Co. v. Muscoco Local No. 123, 321 U. S. 590, where the

Supreme Court held that underground travel time in an employer's mine was worktime. Particular emphasis was given this passage from the Supreme Court's opinion:

"Such travel, furthermore, is not primarily undertaken for the convenience of the miners and bears no relation whatever to their needs or to the distance between their homes and the mines. Rather the travel time is spent for the benefit of the petitioners and their iron ore mining operations."

These elements are all present in the instant case. The requirement of checking the assignment board is, at the least, primarily for the benefit of defendant and does not bear any relation to the needs of the locomotive operators. Moreover, the activity involved requires mental and physical exertion and is controlled by defendant. During the fifteen minute period in question plaintiffs are on defendant's property, are under defendant's control and must obey all defendant's rules and regulations.

While defendant is authorized to fix the compensation and define the duties of its employees, it does not have the authority, as noted by the Court in Anderson to "act arbitrarily to the prejudice of its employees without the intervention of the courts."

The district court found that both Abbott and Anderson were distinguishable from the instant case. However, it did so on the assumption that the Portal to Portal Pay Act was applicable to the matter at bar, a question which will be dealt with infra, and not on the question of whether those cases held that activity identical to that in issue here was "work" within the meaning of 5U.S.C. Section 5544. Clearly, the square holding of both cases is that travel time similar to that here involved is compensable as "work" under the statute.⁶

Moreover, in Albright v. U.S. 161 Ct. Cl. 356 (1963), the Court of Claims held that security guards were entitled to overtime pay for the 15 minute daily period during which they were required to report, draw their equipment and take the

6. The decision of the district court in Anderson was reversed on grounds not applicable here, since the Court of Appeals found that the personnel in question were "vessel employees" and thus required under 5 U.S.C. Section 946 (now 5 U.S.C. Section 5342 (b) to be paid in accordance with "the wage practices of the maritime industry". Since such travel time was not compensable in the maritime industry, the Court of Appeals held that the dredge employees were not entitled to compensation for this time. However, the Court of Appeals holding in no way disturbed the conclusion of the District Court that the time in question was "work time". This finding had no bearing on the appellate decision since even if the activity was worktime, it was not compensable in the maritime industry.

2 to 10 minute walk to their posts in order to be there at the start of their tour of duty. This procedure enabled officials at the Naval Base involved to avoid having a post go unmanned, just as the procedure employed by the company in the case at bar insures continuous operation of the locomotives. If the activity involved in Albright was "work" then the instant activity must be similarly construed.

The Supreme Court's decision in Anderson v. Mt. Clemens Pottery Co. 328 U. S. 680 (1946) also bears strongly on the issue of whether the activity at bar is "work". There, in a case arising under the Fair Labor Standards Act, one of the issues confronting the Court was whether the time spent by employees in punching a time clock, walking to his place of work and preparing to start work, was "working time". The Court held that this activity was working time reasoning as follows:

"... The time necessarily spent by the employees in walking to work on the employer's premises, following the punching of the time clocks, was working time. . . Such time was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory. Those arrangements in this case compelled the employees to spend an estimated 2 to 12 minutes daily, if

not more, in walking on the premises. Without such walking on the part of the employees, the productive aims of the employer could not have been achieved. The employees' convenience and necessity, moreover, bore no relation whatever to this walking time; they walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business. In that respect the walking time differed vitally from the time spent in traveling from workers' homes to the factory. . . It follows that the time spent in walking to work on the employer's premises, after the time clocks were punched, involved "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer". (Emphasis supplied).

The undersigned passages in the quotation set forth above are directly on point here. Without the act of the locomotive operators in checking the assignment board the main function of defendant -- transiting vessels through the Canal -- could not be accomplished. And, though the act of checking the assignment board may not be "burdensome", it does require mental and physical exertion.

POINT TWO

The Portal to Portal Pay Act 29 U.S.C. Section 251 et seq. is Not Applicable to Wage Board Employees of the Panama Canal Company so as to Preclude the Recovery of Overtime Pay in this Case.

The Court below failed to consider whether the activity

here in issue was "work" under 5 U.S.C. Section 5544, since it relied on the provisions of the Portal to Portal Pay Act 29, U.S.C. Section 251 et seq., and particularly Section 254 of that Act, which provides that travel on the employer's premises is not compensable except under special circumstances not present here. In so doing it was necessary for the district court to find that the Portal to Portal Pay Act is applicable to wage board employees of the federal government, including the Panama Canal Company. We submit that this finding was clearly in error.

The lower court reached its conclusion by first referring to Section 18(b) of the Fair Labor Standards Act (hereinafter referred to as the "FLSA") 29 USC Section 218(b), which became effective on September 23, 1966, and which provides that wage board employees in the Canal Zone and non-appropriated fund employees under the jurisdiction of the Armed Forces shall have their wage and overtime rates fixed and adjusted at a level not less than that provided for in the FLSA. Judge Corcoran then concluded that since the Portal to Portal Act had amended the FLSA and dealt with overtime compensation, it was applicable to the instant case.

Section 18(b) of the FLSA falls far short of bringing

federal employees under its coverage, or the coverage of the Portal to Portal Act. Its clear purpose is to provide a floor for the wages of federal employees so that no federal employee will receive less than that provided for in the FLSA. Thus Senate Report No. 1487 explains that the language of Section 18(b) was added to the FLSA:

". . . to affirm that no employee of the Federal Government, or of an instrumentality under the jurisdiction of the Federal Government should receive compensation at rates less than those prescribed by the Federal act for private employment."⁷

Moreover, the Section by Section Analysis of the Bill prepared by the Congressional Conference Committee states that Section 18 "is not subject to any other provisions of the act..."

It is abundantly clear that Congress did not intend either the FLSA or the Portal to Portal Act to be applicable to federal employees. Section 262 of the Portal to Portal Act, 29 U.S.C. Section 262, refers back to the FLSA for its definition of the term "employer". The term is defined at Section 203 (d) of the FLSA, 29 U.S.C., Section 203(d)

7. 1966 U.S. Cong. and Adm. News, p. 3024
8. Ibid, p. 3036

which provides:

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States. . .

Manifestly, if Congress had intended to do something as dramatic as extending the Portal to Portal Act to federal employees, it certainly would have done so in a direct fashion and not through the language ^{of} 29 U.S.C. Section 218 (b). Indeed, the present version of 5.U.S.C. Section 5544 was amended in 1967 by the addition of the following language which deals with the subject of travel time:

"...Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively."

Had Congress intended the Portal to Portal Act to apply to federal wage board employees, it would not have been necessary for it to have added the above quoted language to 5 U.S.C. Section 5544, especially after it had amended Section 18 of the FLSA.

Accordingly, it is the travel time language of 5.U.S.C. Section 5544 to which the district court should have looked for guidance and not the Portal to Portal Act. That language indicates that travel time is compensable when it "results from an event which could not be scheduled or controlled administratively". Moreoever, such time is compensable when it "includes the performance of work while traveling".

The day to day location and identity of the locomotives is an event which cannot be scheduled or controlled administratively bythe company. It is for this reason that the operators are required to check an assignment board in order to be at their duty stations at the start of their shift and prevent a locomotive from going unmanned. We have already demonstrated in Point One of this brief that the activity in question has been held to be "work" by prevailing authority. Accordingly, the travel time engaged in by the operators is well within the ambit of 5 U.S.C. Section 5544 and is compensable.

POINT THREE

The Daily 15 Minute Period For Which the Operators Seek Overtime is Beyond the "De Minimis" Maxim Applied by the District Court

Ruling alternatively, the district court held that even if the Portal to Portal Act was not applicable to this case, the operator's claims were defeated by application of the "de minimis" rule. This rule was applied by the Supreme Court in Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680 (1946) where the Court held that "insubstantial and insignificant" periods of work time were not compensable under the FLSA. In addition to the Mt. Clemens case, the lower court relied upon several FLSA decisions where time consumed in preliminary activities or walking was held to be de minimis.⁹ However, the district court failed to cite any cases arising under the Federal Employees Pay Act in support of its application of the "de minimis" maxim. We submit that this maxim is not applicable to the instant case.

5 U.S.C. Section 5544 very clearly provides that

9. Frank v. Wilson & Co., 172 F.2d 712 (7 Cir.) cert. den'd. 337US918 (1949); McIntyre v. Joseph E. Seagram & Sons, Inc., 72 F. Supp. 366 (W.D.Ky. 1947); McComb v. C.A. Swanson & Sons 77 F.Supp 716 (N.D.Neb. 1948); Lasater v. Hercules Powder Co., 73 F.Supp 264 (E.D. Tenn. 1947)

wage board personnel are entitled to "overtime pay for overtime work in excess of 8 hours a day or 40 hours a week". It does not say that such a federal employee is entitled to overtime only if the amount of time involved is not insubstantial or insignificant. This is not to say that there are not periods of time which may be so unsubstantial as to warrant the application of "de minimis" to federal employees. However, what authority there is on the subject clearly indicates that the maxim is not applicable when federal employees are required daily to work an additional quarter-hour period over and above their regular shift.

In Ahearn v. U.S., 142 Ct. Cl. 306 (1958) the Court of Claims relied in part on the "de minimis" rule in support of its holding that "negligible" work time was not compensable. However, the court did not indicate what it meant by "negligible" time.

In Bantum v. U.S., 165 Ct. Cl. 312 (1964), cert. den'd. 379 U.S. 890, federal police sought overtime for time spent drawing weapons prior to the start of their tours of duty. The court there found that it took 5 minutes for the entire shift to draw weapons and ammunition and 15

seconds for any one man to do same. Moreover, the court also found that there were substantial periods of time during which the claimant police could leave their posts for relief. Accordingly, the court held "In the circumstances of the present case, this is negligible and must be regarded as de minimis..." (p. 312).

However, when, as here, the Court of Claims was confronted with a claim for 15 minutes daily overtime, it held that such time was compensable and did not apply the "de minimis" maxim. Albright v. U.S., 161 Ct. Cl. 356 (1953). In that case, as here, the shortest walking time required was two minutes. However, the claimant guards, again as in the instant case, were required to report 15 minutes prior to the start of their shift.¹⁰ If the claimants in Albright were entitled to overtime then surely the operators are entitled to similar treatment in this case.

10. In applying the "de minimis" rule, Judge Corcoran stated that the time here involved was "2 to 15 minutes" (14a). In so doing, the district court ignored its own finding that operators must, of necessity, be at the assignment board at least 15 minutes before the start of their shift (4a). Accordingly what is involved here is a straight 15 minute daily period and not 2 to 15 minutes.

Certainly it stretches the boundaries of fairness to conclude that an instrumentality of the federal government can demand 15 minutes work daily from its employees without compensating them for this time. The underlying policy of the Federal Employees Pay Act as enunciated by Congress at 5 U.S.C. Section 5301 is to maintain federal pay rates at levels comparable to private industry. In our highly industrialized society of today most industries are covered by collective bargaining agreements which provide that employees are entitled to overtime for any portion of an hour worked. Federal employees are not permitted to negotiate pay rates. However, they are entitled to equal treatment with private industry employees including overtime pay for overtime worked.

Significantly, the Panama Canal Company has at no time in the proceedings below raised the defense of "de minimis". We submit that for periods of 15 minutes the "de minimis" rule is not and should not be applied to federal employees.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the order of the district court should be reversed and judgement awarded appellants and all others similarly situated for the relief demanded in the complaint.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 25th day of September, 1970, served upon the following individuals a copy of Appellants' Appeal Brief by placing a copy of said Brief in the United States Mail, postage prepaid:

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TEXT OF STATUTES CITED

FEDERAL EMPLOYEES PAY ACT, 5 U.S.C. Section 5544, et seq.

Section 5544

(a) An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. The overtime hourly rate of pay is computed as follows:

(1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.

(2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

(3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080 and multiply the quotient by one and one-half.

An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service. Time spent in a travel status away from the official duty station of an employee subject to this subsection

is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

FAIR LABOR STANDARDS ACT - 29 USC Section 201 et. seq.

Sec. 218

(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify non-compliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

(b) Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law -

(1) any Federal employee in the Canal Zone engaged in employment of the kind described in section 5102(c) (7) of Title 5, or

(2) any employee employed in a nonappropriated, fund instrumentality under the jurisdiction of the Armed Forces

shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate

provided for in section 206(a) (1) of this title (except that the wage rate provided for in section 206 (b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone) and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 207(a) (1) of this title.

PORAL-TO-PORAL PAY ACT - 29 USC Section 251 et. seq.

Sec. 254

(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 -

(1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either -

(1) an express provision of a written or nonwritten contract in effect at the time of such activity, between such employee, his agent or collective-bargaining representative

and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

NO. 24464

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WADE V. CARTER, JR., FRANK R. COSTANZO,
ARTHUR M. HILAND, ROBERT KNAPP,
YANE LEVES, LEONARD B. WILSON,
and all others similarly situated,

Appellants

v.

PANAMA CANAL COMPANY,

Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

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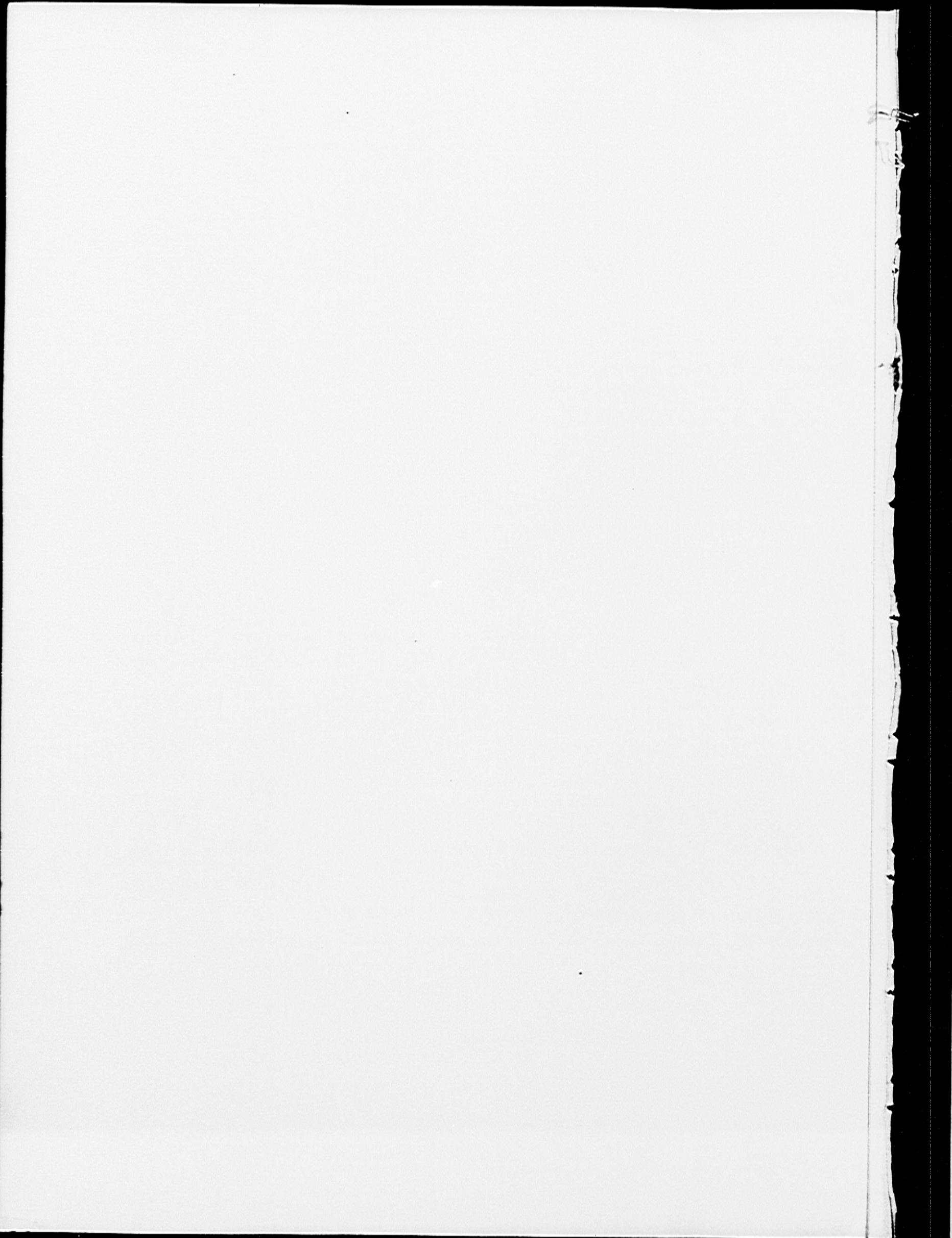
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United States Court of Appeals
for the District of Columbia Circuit

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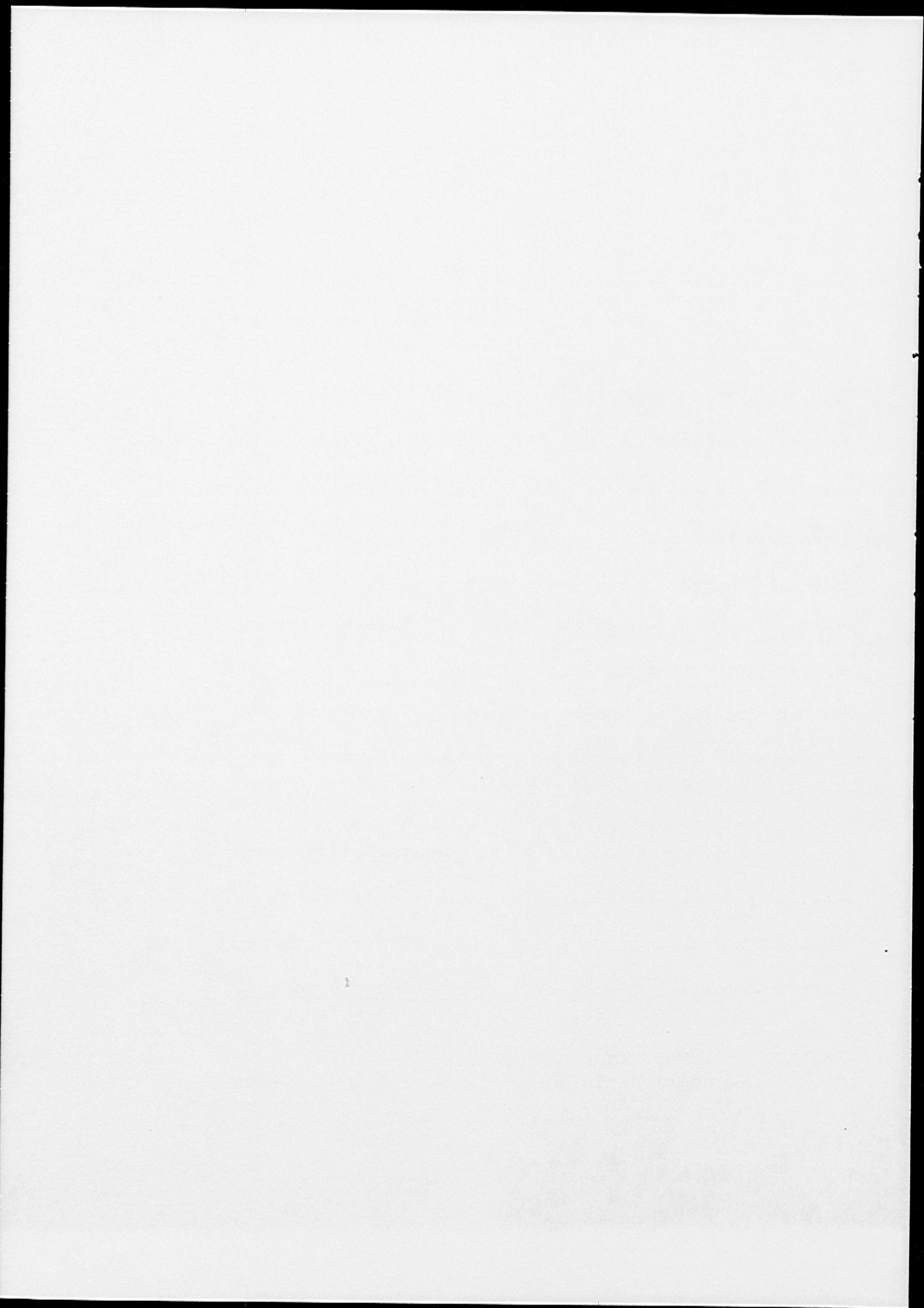
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No. 24464

WADE V. CARTER, JR., FRANK R. COSTANZO,
ARTHUR M. HILAND, ROBERT KNAPP,
YANE LEVES, LEONARD B. WILSON,
and all others similarly situated,

Appellants

v.

PANAMA CANAL COMPANY,

Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

QUESTIONS PRESENTED*

1. Whether by virtue of the Portal-to-Portal Pay Act, 29 U.S.C. 254(a), towing locomotive operators of the Panama Canal Company are not entitled to overtime compensation for the 15 minutes per day when they arrive on the Company's premises prior to the start of their shift.
2. Whether the operators are nevertheless entitled to such compensation under the Federal Employees Pay Act, 5 U.S.C. 5544.

STATEMENT OF THE CASE

This action was brought in the District Court for the District of Columbia by locomotive operators employed by the Panama Canal Company, on behalf of themselves and others similarly situated, to recover overtime compensation for hours allegedly worked in excess of the statutory maximum provided in 5 U.S.C. 5544(a). After admitting depositions and taking testimony, the district court, by Memorandum and Order filed on May 20, 1970, ruled in favor

* This case has not previously been before this court.

of the Company and denied the operators' claim.

1. The facts. The Panama Canal consists of three lockage areas: Pedro Miguel and Miraflores on the Pacific side; and Gatun on the Atlantic. Each plaintiff works at one of these areas as an operator of an electrical towing locomotive. While moving along the side of a lock chamber, three locomotives -- one along side, one in front and one ^{1/} to the stern -- guide each ship through the lock. (52a.)

The Canal is run around the clock and each operator ^{2/} works an eight-hour shift. His duty post at the start of a shift is the locomotive (48a, 112a), which he walks to after passing through a gate at the entrance to the lockage area.

When the shift ends a locomotive, if it were being utilized, could wind up anywhere along the lock wall (31a, 84a, 100a, 103-104a); if, however, a locomotive is idle,

1/ "a." references are to the Appendix.

2/ That is, the place where he is required to be.

the operator drives it back to a point near the entrance gate, where it remains until the change of shifts (109-110a, 69-70a).

While testimony varied about how long it would take to walk to a locomotive placed at the farthest possible point from the gate, the highest estimates were about 15 minutes. (23a, 34a, 46a, 68a.) ^{3/} If the locomotive were spotted at the closest location to the gate, however, the walk would take only a few seconds or one to two minutes, depending on the lockage area. (33a, 51a, 83a.)

Since operators are not permanently assigned to a particular locomotive and since it is not known where a particular locomotive will be when the shifts change, the operators arrive at the gate approximately 15 minutes before the start of their shift in order to insure being

^{3/} As to the Pedro Miguel area, one operator estimated that he allowed himself 12 to 15 minutes. (23a.) For Miraflores, another operator said it would take 10 to 15 minutes. (68a.) At Gatun the walk would be about 11 minutes. (83a.) See Memorandum from the Chief of the Locks Division, at 133a.

at their duty post when the shift begins. (134a.) Near each gate, at a point where the incoming employees have to pass by, is an assignment board, informing each operator of the locomotive to which he is assigned and its location.. (30a, 45a, 72a, 83a, 88a, 99a.) Apparently, only a few seconds are consumed by the operator's glancing at the board and noting his assignment. (45a, 66a.)

Between the time he passes through the gate and checks the assignment board, and the start of the shift, an operator has no duties. (56a.) Of course, if an operator's locomotive is located other than at the farthest point from the gate he is able to relieve early if he so desires. Relieving before the shift change has apparently been the general practice at the Canal and, accordingly, the Company permits relieved operators to quit work up to ^{4/} 20 minutes early. (46a, 90a, 134-135a.)

4/ They are of course still paid for 8-hours work.

Over the years, the Company's timekeeping procedure for the operators has been quite informal. There are no timeclocks to punch and no one records the actual time when an operator enters the lockage area. A Company supervisor testified that he would not even necessarily know if a man were late unless the relieved operator complained. (87a.) Apparently such complaints are uncommon. (87a.) And even when there is a complaint, rarely will an employee be docked for being late (87a); indeed, one operator stated that, as far as he could recall, the last instance of anyone losing pay for this reason occurred over five years ago (31a).

Treating the locomotive as the duty station for the start of a shift is a practice dating back to the beginning of the Canal's operations over 50 years ago.

5/ Before 1967, when the Company discontinued the practice, a "timekeeper" was stationed at each gate. But his only function was to note that an operator had arrived; he did not record the time of arrival and his records were not used in determining an employee's pay. (113-114a.)

(112a, 137a.) However, an exception has been made when an operator is called in on an emergency basis. In such situations, an operator's compensable time begins when he enters the gate. (123a.) The Chief of the Locks Division explained that when an operator is called in, another operator from the last crew is usually working overtime because he has not been relieved. (124a.) In these circumstances the "called-in" operator does not get his assignment from the board; rather "when he comes into the area, the supervisor must determine where he can best be utilized." (124a.) This determination, which would depend on, among other things, when the called-in operator arrives, may take some time. (Id.) Also, the incoming operator may be put on a stand-by basis, without being assigned to a locomotive. (Id.)

The Chief of the Locks Division also testified about recent surveys of crew utilization time. The results of a study conducted from January to December 1969, indicated that "At Miraflores, the range of crew use was

from 68 per cent to 72.5 per cent; and at Pedro Miguel, the range was from 54.5 per cent to 76 per cent. The 76 per cent figure is nontypical because it covered a period when only one lane was in service due to overhaul. The typical figures are from 54.5 to 59.1 per cent." (108a.) At Gatun, "the range of percentage operating time that a crew was actually engaged in operation is from a minimum ^{6/} of 88.1 per cent to a maximum of 93.2 per cent." (15a.)

In addition, the Locks Division Chief pointed out that all persons, including working and nonworking employees and tourists, were subject to Company safety rules while they were in the lockage areas. (125a.)

2. The proceedings below. In the district court, plaintiff-operators sought overtime compensation at the rate of 1½ times their basic pay rate for 15 minutes per

6/ During idle time, the operators "are permitted to leave their locomotives. They must stay where they can return to their locomotives in a relatively short time. The Company has ⁷ some shelters built on the lock wall where they can wait. If the break is long enough, they may park their locomotives and go to a mess hall which is provided with benches, lockers and tables." (109a.)

day, which represented the approximate amount of time they were in the lockage areas preceding each shift change. They argued that this 15 minute period, which at times may have been consumed by walking to the locomotive, constituted "overtime work" within the meaning of 5 U.S.C. 5544.

The district court denied plaintiffs' claim on two grounds. First, under the Fair Labor Standards Act, 29 U.S.C. 218(b), which applied to the operators, the determination whether the time in question is compensable is governed by the Portal-to-Portal Pay Act, 29 U.S.C. 254, which amended the Fair Labor Standards Act, and in light of section 254 this was not worktime. (6-11a.) Second, aside from the Fair Labor Standards Act, plaintiffs were not entitled to compensation under the overtime provision of the Federal Employee Pay Act, 5 U.S.C. 5544, which also applied to them, because the 2-to-15 minute walking period prior to each shift change was de minimis and thus not compensable. (11-15a.)

STATUTES INVOLVED

The relevant provisions of the Fair Labor Standards Act, 29 U.S.C. 201, et seq.; the Portal-to-Portal Pay Act, 29 U.S.C. 251 et seq.; and the Federal Employees Pay Act, 5 U.S.C. 5544, are reproduced in a statutory appendix, infra.

ARGUMENT

- A. Under the Fair Labor Standards Act, 29 U.S.C. 218(b), the Provision of the Portal-to-Portal Pay Act Relating to the Definition of Compensable Worktime, 29 U.S.C. 254(a), Is Applicable to Employees of the Panama Canal Company and Precludes Plaintiffs From Recovering Under Section 218(b)
-

As originally enacted, the Fair Labor Standards Act (F.L.S.A.), 29 U.S.C. 201, et seq., applied to certain private employees, but not to Federal workers. However, in 1966 Congress extended the basic and overtime pay provisions of the Act to cover employees --

(1) described in paragraph (7) of section 202 of the Classification Act of 1949 (5 U.S.C. 1082(7)) whose compensation is required to be fixed and adjusted from time to time as nearly as is consistent with the public interest in

^{7/} The United States was not considered an "employer" within the meaning of the Act. 29 U.S.C. 203(d).

accordance with prevailing rates, and any Federal employee in the Canal Zone engaged in employment of the kind described in such paragraph (7)

Act of September 23, 1966, 80 Stat. 841. This provision, 29 U.S.C. 218(b), which was amended in 1967 to delete the reference in subparagraph (1) to Federal employees other than those in the Canal Zone, now reads:

8/
(b) Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law --

(1) any Federal employee in the Canal Zone engaged in employment of the kind described in section 5102(c)(7) of Title 5, or

(2) any employee employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate

8/ Act of September 11, 1967, § 8, 81 Stat. 222.

not less than the overtime rate provided for in section 207(a)(1) of this title.

As can be seen, the overtime provision in section 218(b) refers back to 29 U.S.C. 207(a)(1) for the standard governing whether a federal employee in the Canal Zone is being paid at less than the prescribed "overtime rate." Section 207(a)(1), commonly known as the "maximum hours provision," requires compensation to be paid at $1\frac{1}{2}$ times the basic rate of pay if an employee's "workweek" is longer than 40 hours. ^{9/} In 1946, when the Supreme Court construed this section in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, the Act itself did not define "workweek." However, shortly after Mt. Clemens, in the face of over \$5,000,000,000 in pending claims generated by that de-

^{9/} Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed;

29 U.S.C. 207(a)(1).

10/
cision, Congress clarified the intended meaning of the term by providing that the following activities should not be considered in computing hours worked:

- (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
- (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Portal-to-Portal Pay Act, 29 U.S.C. 254(a).

In regard to this case, there is no question that towing locomotive operators of the Panama Canal Company comes within section 218(b). 11/ And contrary to plaintiff's

10/ See H. R. Rep. No. 71, 80th Cong., 1st Sess., pp. 3, 4, 5; S. Rep. No. 48, 80th Cong., 1st Sess.; Hart & Wechsler, The Federal Courts and the Federal System, 300-301 (1953).

11/ They are "engaged in employment of the kind described in section 5102(c)(7) of Title 5," and are covered by that subsection rather than 5 U.S.C. 5102(c)(12), which pertains to "employees of an agency who are stationed in the Canal Zone," because the Panama Canal Company is not an "agency." 5 U.S.C. 5101(a)(1)(G)(vii).

assertion (Brief at 16), there can be no doubt that through section 218(b), the standards of section 207(a)(1) apply to Federal employees in the Canal Zone; the language could not be clearer. This being so, the Portal-to-Portal Pay Act, 29 U.S.C. 254(a) & (d), must be referred to in order to determine whether the activities in question should be included within "workweek" under section 207(a)(1).

Recognizing that their activities are clearly not compensable in light of section 254, plaintiffs urge this court to disregard that section and interpret "workweek" in a vacuum, totally divorced from its accepted meaning in the F.L.S.A. But there is not even a hint in the legislative history of section 218(b) to suggest that Congress ever contemplated such a strange result. Rather, "workweek" has the same meaning for Federal employees in the
12/
Canal Zone as for private employees and the effect of section

12/ Senator Morse, the sponsor of the provision in section 218(b) regarding Federal employees in the Canal Zone, said this was needed to put those employees on an equal footing with employees of private companies in the Canal Zone, already covered by the F.L.S.A. 112 Cong. Rec. 20830-20833 (1966).

254 simply cannot be ignored.

In sum, the district court was clearly correct in holding that under the F.L.S.A. plaintiffs were not entitled to overtime pay. (9-11a.) ^{13/} Indeed, although plaintiffs contest the applicability of section 254(a), we do not understand them to argue that they are entitled ^{14/} to recover if that section does apply.

13/ The statements from the legislative history of section 254(a) quoted in the district court's opinion make this abundantly clear. (9-10a.) See especially the statement quoted at 9a from S. Rep. No. 37, 80th Cong., 1st Sess. 45 (1947). See also 6A Lab. Rel. Rep. Wage & Hour Manual 93:319 (binder) (opinion of the Wage & Hour Administrator, July 17, 1967).

14/ Quoting from the Conference Committee Report, which said that section 218(b) would not be "subject to any other provisions of the act," 1966 U.S. Code Cong. & Admin. News 3036, plaintiffs argue that section 254(a) was not intended to apply to Canal Zone employees covered by section 218(b). However, this statement by the Conference Committee obviously referred to the introductory phrase in section 218(b), which reads: "Notwithstanding any other provision of this chapter . . . or any other law" Congress added this to make clear that despite provisions such as 29 U.S.C. 203(d), which defined "employer" to exclude the United States, see note 7, supra, Federal employees in the Canal Zone were nevertheless now covered by the Act. The Conference Committee Report simply reaffirms this intention. In short, the phrase in section 218(b) beginning with "Notwithstanding" does not eclipse the light section 254(a) of the Portal-to-Portal Pay Act sheds upon the maximum hours provision of section 207(a)(1).

B. Plaintiffs' Claim Is Not Cognizable Under the Federal Employees Pay Act, 5 U.S.C. 5544

As is not uncommon in minimum wage legisla-
15/tion, another statute, the Federal Employees Pay Act, 5 U.S.C.
16/5544, appears to overlap the provisions of the F.L.S.A.
17/regarding plaintiffs' entitlement to overtime pay, and it is plaintiffs' contention that the former statute, rather than the F.L.S.A., should be deemed controlling. Plaintiffs' argument apparently is that "overtime work" in 5 U.S.C. 5544 includes activities that are not included as part

15/ See Powell v. United States Cartridge Co., 339 U.S. 497, 518 (1950).

16/ That section now provides in part:

(a) An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week

17/ Although not pertinent to this case, there is one situation where the statutes do not overlap: if a person worked more than 8 hours a day but not more than 40 hours per week, he would be entitled to overtime pay under 5 U.S.C. 5544 but not under the F.L.S.A., see 29 U.S.C. 207(a)(1). In Powell v. United States Cartridge Co., 339 U.S. 497 (1950), which involved a somewhat similar situation, the Supreme Court held that both statutes should be considered as standing together.

18/
of an employee's "workweek" under the F.L.S.A. and, more specifically, includes the activities involved in this case.

1. Since both 29 U.S.C. 218(b) and 5 U.S.C. 5544 appear to deal with the question whether plaintiffs are entitled to overtime compensation, both statutes stand together; one does not exclude coverage by the other. To be sure, long before the 1966 amendment adding 29 U.S.C. 218(b) to the F.L.S.A., the overtime provision of 5 U.S.C. 5544 was found applicable to Government employees of the Canal Zone. United States v. Townsley, 323 U.S. 557 (1945). However, concern about dissension between Federal and private Canal Zone workers caused by disparities in minimum wage levels prompted adoption of 29 U.S.C. 218(b). See 112 Cong. Rec. 20830-20833 (1966) (remarks of Senator Morse).

18/ Plaintiffs are of course correct in observing that 29 U.S.C. 218(b) sets a wage floor. Obviously that is also the effect of 5 U.S.C. 5544. But again, this still leaves the question whether 5 U.S.C. 5544 should be deemed to require overtime compensation for plaintiffs' activities when the F.L.S.A. does not.

As indicated by the legislative history of the 1967 amendment of that section, Congress was well aware that it overlapped with 5 U.S.C. 5544. But although at that time Congress withdrew F.L.S.A. overtime coverage of certain Federal employees because this was "unnecessary in view of 5 U.S.C. 19/ 5544(a)," F.L.S.A. coverage of Federal employees in the Canal Zone was retained. Act of September 11, 1967, § 8, 81 Stat. 222.

We thus have two statutes, not mutually exclusive and standing together, the one providing that Federal employees are entitled to overtime compensation for "overtime work," 5 U.S.C. 5544, the other that such compensation is required if the "workweek" exceeds the maximum of 40 hours, 29 U.S.C. 218(b), 207(a)(1), 254(a). With regard to the precise issue in this case -- whether certain of plaintiffs' activities should be considered as worktime, thereby entitling them to overtime compensation -- the

19/ S. Rep. No. 482, 90th Cong. 1st Sess., 1967 U.S. Code Cong. & Admin. News 1566.

F.L.S.A. speaks with specificity through 29 U.S.C. 207(a)(1) and 29 U.S.C. 254(a) & (d). On the other hand, no provision of the Federal Employees Pay Act sheds any light on whether plaintiffs' activities are "overtime work" under 5 U.S.C. 5544. In these circumstances it is sensible to suppose that Congress assumed the courts would look to the explicit standards provided through 29 U.S.C. 218(b), rather than the undefined language in 5 U.S.C. 5544, especially since Congress enacted 29 U.S.C. 218(b) much later and expressly referred to Federal employees of the Canal Zone. Moreover, reconciling the statutes in this manner effectuates the purpose of section 218(b) because the question whether overtime compensation is required for certain employee activities in the Canal Zone would not depend on whether the employee worked for a private company or the Government. See note 12, supra.

Relying on a recent amendment to 5 U.S.C. 5544 with regard to compensation for "time spent in a travel status away from the official duty station of an employee,"

plaintiffs argue that this provision supplies a definite standard for determining whether they should receive overtime pay in this case. In plaintiffs' view, this section entitles them to compensation because their 15-minute early arrival "results from an event which could not be scheduled or controlled administratively." 5 U.S.C. 5544(iv). However, as the language and legislative history clearly show, that section pertains to a situation wholly different from the one presented by plaintiffs' claim. The provision applies only to an employee in a "travel status," that is, an employee who travels "outside his regular work schedule." S. Rep. No. 801, 90th Cong., 1st Sess., 1967 U.S. Code Cong. & Admin. News 2287. This hardly characterizes plaintiffs' one-to-fifteen-minute walk to their locomotives each day before their shift begins. Moreover, subsection (iv), which plaintiffs seek to invoke, was enacted to dissuade the scheduling of employees for travel on their days off and to allow compensation for this only

20/

if it could not be avoided. Obviously, this provision has no bearing on the facts of this case where plaintiffs' walking to their duty post occurred each day they worked.

2. Quite apart from the foregoing considerations, it is significant that, in cases presenting situations analogous to this case, the judicial interpretation of 5 U.S.C. 5544 and similar overtime provisions for Federal employees has been consistent with Congress' construction of the overtime section of the Fair Labor Standards Act in

20/ This is made clear in the Senate Report:

An employee should not be required to travel on his offday in order to be at work at a temporary duty station early Monday morning to attend a meeting. It is an imposition on his private life that should not be made. Nevertheless, pay for travel status should not be made so attractive that employees would seek to travel on their offdays in order to receive overtime pay. Proper scheduling and administrative planning is the answer to the problems of travel pay in many cases. When emergencies occur or when events cannot be controlled realistically by those in authority, traveltime must be paid for.

S. Rep. No. 801, 90th Cong., 1st Sess., 1967 U.S. Code Cong. & Admin. News 2288.

29 U.S.C. 254(a). As will appear below, these cases, many of which are cited in plaintiffs' brief, indicate that in the absence of a contrary custom or practice, time spent by the employee in walking to his actual duty station is not compensable working time.

In Ahern v. United States, 142 Ct. Cl. 309, 312, (1958), firefighters manning island firestations had to take half-hour rides on boats provided by the Government in order to travel to and from their duty stations each day. The court held this did not constitute working time and that the firefighters were therefore not entitled to overtime compensation.

Anderson v. Panama Canal Co., 194 F. Supp. 765 (D. C.Z. 1961), rev'd on other grounds, 312 F. 2d 98 (C.A. 5), certiorari denied, 375 U.S. 832 (1963), on which plaintiffs place heavy reliance, is to a similar effect. In Anderson, dredge crews travelled daily by launch or land vehicles supplied by the Company in order to reach their dredges. The time spent in travelling ranged from 5 minutes to 1½ hours, for which the crewmembers were not compensated.

The evidence also showed that crewmembers were required to load and unload the transport launches and land vehicles at the beginning and end of the trip. On these facts, the district court held that those crewmembers travelling by land vehicles were not entitled to overtime compensation, but those travelling by launch could recover. The court drew this distinction on the basis that travel over water involved considerable danger, especially during tropical storms, and on the ground that the Company had a custom and practice of compensating for travel over water, although no such custom existed for travel over land.

In Abbott v. United States, 151 F. Supp. 929 (Ct. Cl. 1957), ship pilots employed by the Panama Canal were customarily paid for the 2 1/3 hours return trip back across the Isthmus after they had taken a ship through the Canal -- except if they had already worked 40 hours. In light of the custom of considering this time compensable, the court found no basis for the exception and awarded overtime compensation.

The Ahern-Anderson-Abbott line of cases is sufficient to show that time spent in travelling to the actual place of work is not compensable working time unless there has been ^{21/} a custom of considering it as such. This of course is

21/ Other decisions dealing with overtime pay for Federal employees are in accord with these cases. See, e.g., Ayers v. United States, 186 Ct. Cl. 350 (1968); Biggs v. United States, 152 Ct. Cl. 545 (1961); cf. Bantom v. United States, 165 Ct. Cl. 312 (1964).

Albright v. United States, 161 Ct. Cl. 356 (1963), which plaintiffs cite, is inapposite. There, security guards sued under the predecessor to 5 U.S.C. 5542(a), which requires compensation to be paid if an employee is officially ordered to report. The court found that the guards were ordered to report 15 minutes before their shift began, during which time they performed various duties such as drawing their pistol and ammunition, standing muster for inspection and attendance, receiving instructions and assignments, and punching a time clock. On these facts the court held the guards were entitled to overtime compensation.

By contrast, in this case plaintiffs had no duties after arriving at the gate except to walk to their locomotive. And the statute on which they rely, 5 U.S.C. 5544, does not base entitlement to overtime compensation on an official order to report, but rather on whether "overtime work" was performed.

essentially the rule Congress embodied in 29 U.S.C. 254(a)
22/
when it clarified the F.L.S.A.

Even aside from the F.L.S.A., these cases make clear that if each plaintiff had to walk 15 minutes each day in order to reach his locomotive, he would not be entitled to overtime compensation for that activity under 5 U.S.C. 5544. That plaintiffs only occasionally have to begin walking as soon as they pass the gate does not alter this result. In fact, as will appear below, it is a further reason for the Court to hold that plaintiffs cannot recover.

22/ Thus, "walking, riding, or traveling to and from the actual place of performance of the principal activity" of the employee is not compensable working time unless such activity is compensable by a "custom or practice in effect, at the time of such activity, at the establishment" where the employee works. 29 U.S.C. 254(a)(1) & (b).

If the parties were wrong in following the time-honored custom and practice at the Company of not considering this time as working time, then the Company acted against its interest in allowing operators a choice whether to relieve before the beginning of their shift so that on-duty operators could leave up to 20 minutes early. For if working time began at the moment the operator entered through the gate, incoming operators would have been required to relieve as soon as they arrived; and relieved operators would then depart. Moreover, there were many days when the time the operators spent in the lockage area did not exceed 8 hours because they were relieved early, and still more days when the actual time amounted to less than the

23/ There is nothing to plaintiffs' contention that the practice with respect to "called-in" operators established a different custom at the Canal. The Company had ample reason to compute compensable time for called-in operators at the moment they entered the gate rather than at the time they arrived at the locomotive, especially since such operators were often put on a stand-by status without being assigned to any particular locomotive. (123-124a.) Contrast Abbott v. United States, 151 F. Supp. 929 (Ct. Cl. 1957).

15 minutes above 8 hours for which they now seek overtime compensation.

The facts of this case illustrate well the reasons that impelled Congress to overrule the Supreme Court's interpretation of "workweek" in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), which disregarded "long-established customs and practices . . . thereby creating wholly unexpected liabilities, immense in amount"

24/ 29 U.S.C. 251(a). In Mt. Clemens, it took an employee from 2 to 12 minutes to walk from the timeclock to his actual place of work; also, because of the size of the workforce, an employee had to allow himself at least 8 minutes for punching in at the timeclock. The Court held

24/ In the 6-month period following the Mt. Clemens decision, over \$5,000,000,000 in claims were pending before the courts, with more on the way. Hart & Wechsler, The Federal Courts & the Federal System 300-301.

that the employees' 2 - 12 minute walking period constituted compensable work time under the F.L.S.A. ^{25/}

This holding ignored the common understanding of the terms "work" or "workweek"; overlooked the assumption that Congress used those words in their ordinary meaning to the employees and employers affected by the F.L.S.A.; and would have brought about a complete revision of industry

25/ It is important to emphasize that the Court required compensation only for actual walking time, which in this case would be about 1 to 15 minutes. The Court did not decide that employees were entitled to compensation for the 8 minutes they had to allow themselves for punching in. Thus, under Mt. Clemens, an employee who arrived 8 minutes early, as was necessary, and then walked for 3 minutes to his duty station, was entitled to compensation only for 3 minutes, not 11.

Contrary to plaintiffs' claim (Brief, at 21, n. 10), in this case the district court was therefore correct in stating that if Mt. Clemens applied, the question would be whether the operators should recover for the 2 to 15 minutes per day required for walking to their locomotives. This would be the actual walking time. Not even Mt. Clemens would allow compensation for the difference between the time actually spent in walking and the 15-minutes before the shift change.

bookeeping practices, a result wholly foreign to the central purpose of the Act. For these reasons Congress found it necessary to take quick, corrective action by passing the Portal-to-Portal Pay Act, 29 U.S.C. 201; see 29 U.S.C. ^{26/} 254(a).

With regard to this case, to interpret 5 U.S.C. 5544 as Mt. Clemens interpreted 29 U.S.C. 207(a)(1) -- which is essentially what plaintiffs urge -- would be to ignore the over 50-year old custom and practice of treating the locomotive as the duty station of the operator (112a, 137a); would compel a complete overhauling of the Company's time-keeping system in order to keep track of the varying times it took an operator to reach his locomotive during the workweek, see note 25, supra; and, in short, would fail to recognize the very reasons why Congress overruled Mt. Clemens.

26/ The legislative history of the Portal-to-Portal Pay Act is recounted in 29 C.F.R. 790.1-790.12 (1970).

Even more important, a decision resurrecting Mt. Clemens and applying it to 5 U.S.C. 5544, would have far-reaching implications, affecting not only Federal employees in the Canal Zone, but also the three-quarters of a million Federal employees covered by that section. ^{27/}

Although claims spawned by such a holding might not approach the proportions reached after Mt. Clemens, the underlying factors that constrained Congress to overrule that decision are nevertheless present and provide reason enough for this Court to interpret 5 U.S.C. 5544, as applied to this case, in a manner consistent with the Fair Labor Standards Act, 29 U.S.C. 218(b), 207(a)(1), as amended by the Portal-to-Portal Pay act, 29 U.S.C. 254(a) & (d). As we have shown, under such an interpretation, the plaintiffs are not entitled to overtime compensation.

^{27/} See H. R. Rep. No. 1366, 89th Cong., 2d Sess., p. 15 (1966), estimating, at that time, 665,000 Federal employees covered by 5 U.S.C. 5544.

CONCLUSION

The judgment of the district court denying plaintiffs' claim for overtime compensation should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

Relevant sections of the Fair Labor Standards Act,
29 U.S.C. 201, et seq., provide in pertinent part:

29 U.S.C. 207(a)(1):

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess on the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. 218(b)

Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law --

(1) any Federal employee in the Canal Zone engaged in employment of the kind described in section 5102(c)(7) of Title 5, or

(2) any employee employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for

in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title.

The Portal-to-Portal Pay Act, 29 U.S.C. 254(a)

and (d), provides

(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947--

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

* * *

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

The Federal Employees Pay Act, 5 U.S.C. 5544, provides in pertinent part:

(a) An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing

rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 hours a week. The overtime hourly rate of pay is computed as follows:

- (1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.
- (2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.
- (3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay of 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service. Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.